Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

WEINSTEIN, EISEN & WEISS LLP,

Petitioner,

v.

DAVID A. GILL, CHAPTER 11 TRUSTEE;
COMERICA BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED

There is a sharp split in the circuits about the use — and misuse — of the statutory mootness provision in 11 U.S.C. § 364(e). In this case, § 364(e) was used to shield from appellate review an agreement between a bankruptcy trustee and a bank to facilitate the payment of hundreds of thousands of dollars to the trustee and his selected professionals, to the exclusion of other equally ranked claimants who are otherwise entitled to share-and-share-alike under the Bankruptcy Code. In negotiating funding for a bankruptcy estate, the bank and the trustee grafted onto the financing contract (and the related order) a provision saying that certain administrative expenses of the bankruptcy estate allowable under § 503(b)[1] could be paid with loan funds or asset sale proceeds, while others could not, notwithstanding the fact that such loan funds and asset proceeds were property of the estate, such claims were of equal rank and could not be discriminated against *inter se* under the Bankruptcy Code, and no other money would be available to pay the excluded claims. The circuits are sharply split on whether such a provision escapes scrutiny merely because it was included in an unstayed financing order.

1. Does absence of a stay pending appeal of a bankruptcy financing order necessarily require an outright dismissal for mootness, or does the absence of a stay merely limit the relief available on appeal? Is mootness negated if relief can be fashioned without upsetting the validity of the post-petition debt or the priority of security granted to secure it?

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1. All statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*, unless otherwise indicated.

2. Where mootness applies, does it extend to (and hence extinguish appeals about) *any* clause included in a bankruptcy financing order? Or does mootness extend only to terms actually about financing that are governed by or authorized under 11 U.S.C. § 364?

II.

PARTIES TO PROCEEDING

Petitioner is the law firm of Weinstein, Eisen & Weiss LLP. Petitioner is an administrative creditor of the bankruptcy estate of Cooper Commons LLC (the "Petitioner").

Respondents are David A. Gill, Chapter 11 Trustee for the bankruptcy estate of Cooper Commons, LLC ("Gill" or the "Trustee") and Comerica Bank, Successor By Merger To Comerica Bank-California ("Comerica" and, together with Gill, the "Respondents").

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to Proceeding	iii
Table of Contents	iv
Table of Cited Authorities	vi
Table of Appendices	ix
Opinions Below	1
Basis for Jurisdiction in this Court	1
Statutory Provisions Invoked	2
Statement of the Case	4
A. Statement of Factual Circumstances.	4
B. Statement of Legal Proceedings Below.	5
Reasons for Granting the Petition	7
A. The Ninth Circuit's Decision Created a Sharp Split Among the Five Circuits That Have Addressed the Mootness Issue.	8
B. The Mischief in the View of the Sixth and Ninth Circuits.	13

Contents

Page

C. The Ninth Circuit's Decision Is Fundamentally Flawed. 14

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

CASES

Boullioun Aircraft Holding Co., Inc.
v. Smith Management
(In re Western Pacific Airlines, Inc.),
181 F.3d 1191 (10th Cir. 1999) 8

Burchinal v. Central Washington Bank
(In re Adams Apple, Inc.),
829 F.2d 1484 (9th Cir. 1987) 7

In re EDC Holding Co.,
676 F.2d 945 (7th Cir. 1982) 12

Feder v. Lazar (In re Lazar),
83 F.3d 306 (9th Cir. 1996) 13

New York Life Insurance Co.
v. Revco D.S., Inc.
(In re Revco, D.S., Inc.),
901 F.2d 1359 (6th Cir. 1990) 9

In re Nucorp Energy, Inc.,
764 F.2d 655 (9th Cir. 1985) 14

Resolution Trust Corp.
v. Swedeland Development Group, Inc.
(In re Swedeland Development Group, Inc.),
16 F.3d 552 (3d Cir. 1994) 12

Cited Authorities

Page

Shapiro v. Saybrook Manufacturing Co., Inc. (In re Saybrook Manufacturing Co., Inc.), 963 F.2d 1490 (11th Cir. 1992) 11

United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988) 10

Unsecured Creditors' Committee v. First National Bank & Trust Co. of Escanaba (In re Ellingser MacLean Oil Co., Inc.), 834 F.2d 599 (6th Cir. 1987), *cert. denied*, 488 U.S. 817, 109 S.Ct. 55, 102 L.Ed.2d 33 (1988) 9

Weinstein, Eisen & Weiss LLP v. Gill (In re Cooper Commons), 424 F.3d 963 (9th Cir. 2005) 1

Cited Authorities

Page

STATUTES

11 U.S.C.
§ 101 i
§ 330 14
§ 364 ..... ii, 8, 13
§ 364(d) 2
§ 364(e) ..... *passim*
§ 502(f) 3
§ 503(b) ..... i, 3
§ 507(a) 3

28 U.S.C.
§ 1254(1) 1

TABLE OF APPENDICES

Page

Appendix A — Order And Amended Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed September 13, 2005 And Amended December 7, 2005 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed September 13, 2005 ..... 12a

Appendix C — Memorandum Of The United States Bankruptcy Appellate Panel Of The Ninth Circuit Filed August 19, 2003 ..... 23a

Appendix D — Order Of The United States Bankruptcy Court For The Central District Of California, Los Angeles Division Approving Third And Fourth Amendments To Third Stipulation For Financing Under Construction Loan Agreement And Adequate Protection On Final Basis With Exhibits Dated And Filed February 5, 2003 .... 46a

I.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Weinstein, Eisen & Weiss LLP ("WEW" or the "Petitioner") respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit that dismissed its appeal as entirely moot under 11 U.S.C. § 364(e).

II.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit was initially reported as *Weinstein, Eisen & Weiss LLP v. Gill (In re Cooper Commons)*, 424 F.3d 963 (9th Cir. 2005). [Appendix: B]. In an *Order and Amended Opinion* issued *sua sponte* on December 7, 2005 (the "Amended Opinion"), the Ninth Circuit withdrew its first Opinion and superceded it with the Amended Opinion. [Appendix: A].

III.

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 13, 2005. [Appendix: B]. On December 12, 2005, within 90 days of the entry of the Ninth Circuit's judgment, Petitioner Weinstein, Eisen & Weiss LLP ("Petitioner" or "WEW") filed this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

IV.

STATUTORY PROVISIONS INVOKED

The following statutes are involved in this case:

11 U.S.C. § 364(d) (in pertinent part):

> (1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if —
>
> (A) the trustee is unable to obtain such credit otherwise; and
>
> (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

11 U.S.C. § 364(e):

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such

authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. § 507(a) (in pertinent part):

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

11 U.S.C. § 503(b) (in pertinent part):

After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title [pertaining to involuntary bankruptcy cases], including —

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries or commissions for services rendered after the commencement of the case. . . .

V.

STATEMENT OF THE CASE

A. *Statement of Factual Circumstances.*

Cooper Commons, LLC (the "Debtor or "Cooper Commons") was in the business of developing (*i.e.*, building and selling units in) a 62-unit condominium project (the "Condo Project"). By the time Cooper Commons filed its Chapter 11 petition in February 2002, the Condo Project was roughly 80% completed. WEW represented Cooper Commons in connection with filing its bankruptcy petition and with post-petition financing (and all other chapter 11 matters) until Respondent Gill was appointed as the bankruptcy trustee in November 2002. The Condo Project was financed primarily with a construction loan from Respondent Comerica (the "Construction Loan") .

Through a series of post-petition agreements between the Debtor and Comerica (prior to the Trustee's appointment), post-petition funds were advanced under the Construction Loan. The last of these post-petition agreements arose in October 2002 when the Debtor (still acting as the debtor-in-possession) and Comerica executed a *Third Stipulation for Financing Under Construction Loan Agreement and Adequate Protection* (the "Third Financing Stipulation") by which the Debtor sought an additional $1,803,000 under the Construction Loan. That stipulation was approved by the bankruptcy court, but the money was not actually advanced (for reasons not material here); the matter was pending when Gill became the Trustee shortly thereafter.

Immediately upon his appointment in November 2002, and continuing into February 2003, Respondent Gill engaged in a series of negotiations with Respondent Comerica with regard to finishing the Condo Project and the Construction Loan. These negotiations resulted in Gill (as the Trustee) and Comerica entering into a sequence of four different amendments to the Third Financing Stipulation. In the Fourth Amendment to the Third Financing Stipulation (the "Fourth Financing Amendment"), the subject matter of the negotiations broadened significantly, going far beyond the completion of the Condo Project. At that point, Respondents Gill and Comerica added to the Fourth Financing Amendment a new provision creating an "Administrative Fund" of $888,449 with some of the loan funds (which the estate would have to repay); and a "Fee Disbursement Provision" which provided that the Administrative Fund would be used to pay only Gill and his selected professionals, to the permanent exclusion of all other administrative claimants, including Petitioner. Gill served the Fourth Financing Amendment by mail on January 31, 2003, a Friday, and sought its approval on a final basis at a hearing the following Wednesday, February 5, 2003. At the February 5, 2003 hearing, WEW objected on due process and substantive grounds but the bankruptcy court approved the Fourth Financing Amendment, including the creation of the Administrative Fund and the Fee Disbursement Provision. Respondent Gill has since disbursed most of the Administrative Fund, none to WEW. WEW asserts an unpaid administrative expense in excess of $500,000.

B. ***Statement of Legal Proceedings Below.***

Before the bankruptcy court, Petitioner argued it had not received adequate notice of the proposed creation of the

Administrative Fund and the discriminatory Fee Disbursement Provision (sometimes, the "Due Process Issue"). Petitioner also argued the proposed creation of the Administrative Fund and implementation of the Fee Disbursement Provision were substantively unsupportable and could not be approved.

The bankruptcy court overruled all of Petitioner's arguments. [Appendix: D]. Petitioner appealed to the BAP, repeating its arguments that the Financing Order could not separately classify, or discriminate among, equally ranked administrative expenses, nor could it effectuate the *de facto* subordination of Petitioner's fees to Gill's. Petitioner also raised the Due Process Issue relative to the notice (or lack thereof) given in advance of the February 5, 2003 hearing. For their part, Respondents argued the appeal was moot. The BAP overruled Respondents' mootness argument and also overruled Petitioner on the Due Process Issue. The BAP did not reach the merits, however, and affirmed the bankruptcy court, concluding that Petitioner had not adequately raised its substantive arguments below (despite the fact that Respondents had not so contended). [Appendix: C].

The Ninth Circuit dismissed the appeal as moot, after determining there was no due process violation. The Ninth Circuit held that § 364(e) automatically mooted any appeal of a financing order where no stay had been obtained and thereby ruled that provisions creating the Administrative Fund and implementing the Fee Disbursement provision would escape scrutiny because they were included in a financing order. [Appendix: B]. The Ninth Circuit also ruled that the good faith that triggers § 364(e) mootness is presumed, notwithstanding the absence of affirmative evidence on the point. In the Amended Opinion, the Ninth

Circuit ruled that substantial evidence supported the good faith finding. [Appendix: A].

Thus, the Ninth Circuit refused to reach the merits and reaffirmed its stance, first articulated in *Burchinal v. Central Washington Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484 (9th Cir. 1987), that § 364(e) mootness extends to "any provisions of the financing agreement that Comerica *might have bargained for* or that helped to motivate its extension of credit", regardless of whether provision has anything to do with financing and indeed, whether or not the provision is even legal. [Appendix: A]. In so ruling, the Ninth Circuit recognized disagreement on the point, among the circuits. [Appendix: A].

VI.

REASONS FOR GRANTING THE PETITION

There is a sharp split in the circuits on the critical question of how § 364(e) operates, and WEW respectfully submits that the Ninth Circuit erred in joining the Sixth Circuit, and in failing to follow the Third, Seventh and Eleventh Circuits, on this "Mootness Issue". WEW contends that the plain language of § 364(e) does not automatically moot every unstayed appeal of a financing order, it only limits the remedies available upon reversal or modification of a financing order. Here, an appellate ruling reversing the aspects of the Financing Order that created the unequal treatment of administrative claims would not have affected the debt or lien given to the post-petition lender, so relief was available to WEW under the plain language of § 364(e) and the mootness ruling was legal error. For reasons elaborated below, this case not only highlights a sharp split

in the circuits on the Mootness Issue, it raises significant questions about the use, and misuse, of financing proceedings that arise in bankruptcy courts every day.

Every year, *billions* of dollars are loaned to debtors in chapter 11 bankruptcy cases. *All* of it is loaned under the provisions of 11 U.S.C. § 364. Debtors (usually) desperately need this money and the opportunity for anyone intimate with the negotiations to leverage consent to tangential, or even unrelated, covenants is obvious. This case thus brings before this Court important questions about use of the "post-petition financing" process that have produced obvious and articulated splits among the circuits.

Five circuits have addressed this issue and they are split 3-2. A sufficient number of opinions have been issued, and a sufficient number of years have passed, to both establish the split and make clear that it will not be resolved among the circuits. The time is now right for this Court to resolve these issues that affect debtors, secured creditors, unsecured creditors and indeed all constituencies interested in bankruptcy cases, every day, in all the bankruptcy courts across the nation.

A. *The Ninth Circuit's Decision Created a Sharp Split Among the Five Circuits That Have Addressed the Mootness Issue.*

The Ninth Circuit's posture or the issue is the most extreme, but the Ninth Circuit does not stand alone. The Sixth Circuit at least, and arguably the Tenth Circuit,[2] apply a

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2. In *Boullioun Aircraft Holding Co., Inc. v. Smith Management (In re Western Pacific Airlines, Inc.)*, 181 F.3d 1191 (10th Cir. 1999), (Cont'd)

variation of the Ninth Circuit's test. In *Unsecured Creditors' Committee v. First National Bank & Trust Co. of Escanaba (In re Ellingser MacLean Oil Co., Inc.)*, 834 F.2d 599 (6th Cir. 1987), *cert. denied*, 488 U.S. 817, 109 S. Ct. 55, 102 L. Ed. 2d 33 (1988), the Sixth Circuit considered a post-petition lending order that included a term extinguishing all claims against the lender. The Sixth Circuit held that even if the challenged provision exceeded the scope of relief provided in § 364, an appellate attack was moot because the questioned provision was ["part of the whole package"]. 834 F.2d at 602. Thus, a potentially unwarranted and unsupported release of rights of action was sanctioned, merely because it was included in a financing order. This closely parallels this case, where unwarranted, disparate treatment of equally ranked claimants was allowed to stand, merely because it was included in a financing order. That is, in both cases, the challenged provision was, at best, of highly dubious quality standing alone and appeared to significantly abridge third parties' rights, but the circuit courts refused to reach the question(s) at all, simply because the challenged provisions were made part of financing orders.

The Sixth Circuit later confirmed its stance in *New York Life Ins. Co. v. Revco D.S., Inc. (In re Revco, D.S., Inc.)*, 901 F.2d 1359 (6th Cir. 1990), in which it found moot an

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(Cont'd)
the Tenth Circuit held that § 364(e) prohibits not only outright invalidation of a lien or priority where the challenging party has failed to seek a stay, but also modification of the terms of a post-petition lender's bargained-for collateral. 181 F.3d at 1195. Because *Western Pacific* deals with a lender's collateral and not with non-loan terms, it does not squarely address the issues raised here. However, it is easy to infer the Tenth Circuit would join the Sixth and Ninth, if called upon to do so.

appeal that challenged a provision of a financing order that required interest payments on pre-petition, unsecured debt, still another questionable "loan term". The Sixth Circuit again relied on the proposition that the questioned provision was "part of the whole package". 901 F.2d at 1364-65. The Sixth Circuit thus never examined whether usage of bankruptcy estate money to pay interest on unsecured, pre-petition debt was in any way defensible. *Compare, United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 382, 108 S. Ct. 626, 636, 98 L. Ed. 2d 740 (1988) (chapter 11 debtor's undersecured creditor was not entitled to interest on its collateral as compensation for delay caused by automatic stay in foreclosing on collateral).

Both Sixth Circuit opinions drew significant dissents. In his dissent in *Ellingser*, Judge Merritt pointedly observed that:

> Lenders should not be permitted to use their leverage in making emergency loans in order to insulate their prepetition claims from attack. The banks here should not be permitted to make several million dollars in prepetition loans secure and incontestable at the expense of the other creditors by the simple expedient of making a section 364 loan.

834 F.2d at 607 (Merritt, J., dissenting).

Judge Merritt's dissent was echoed by Chief District Judge Hull, dissenting in *Revco*:

> [T]he need for an efficient, practical, emergency response [to a bankruptcy debtor's need for

> funding] should not outweigh the fundamental right to judicial review on appeal. If a simple finding of good faith by a bankruptcy court would insulate from appellate review, any arrangement, even an illegal one, in the absence of a stay, then an essential element of our legal system would have been sacrificed in the name of expediency.

901 F.2d at 1367 (Hull, C.D.J., dissenting).

These dissents highlight the sharp split in the circuits, as they align themselves with the Third, Seventh and Eleventh Circuits. In *Shapiro v. Saybrook Manufacturing Co., Inc. (In re Saybrook Manufacturing Co., Inc.)*, 963 F.2d 1490 (11th Cir. 1992), the Eleventh Circuit considered an appeal from a post-petition financing order that authorized not only new lending, but a form of "cross-collateralization", namely securing unsecured (or under-secured) pre-petition debt with post-petition assets of a bankruptcy debtor. 963 F.2d at 1491-92. Finding cross-collateralization legally abhorrent, the Eleventh Circuit reversed that aspect of the financing order. Rather than mechanically applying a rule of mootness to anything labeled or included in a "financing order", the Eleventh Circuit sensibly looked first at whether the challenged provision was a bona fide financing term. Using precisely the opposite approach used by the Sixth and Ninth Circuits, the Eleventh Circuit concluded that it could not "determine if this appeal is moot under section 364(e) until we decide the central issue in this appeal — whether cross-collateralization is authorized under section 364". *Id.* at 1493.

In analyzing the issue this way, the Eleventh Circuit also could not avoid identifying the split in the circuits: "We reject the reasoning of *In re Adams Apple* and *In re Ellingser*

because they 'put the cart before the horse.' By its own terms, section 364(e) is only applicable if the challenged lien or priority was authorized under section 364". *Id.*

The Seventh Circuit in *In re EDC Holding Co.*, 676 F.2d 945 (7th Cir. 1982) similarly reversed a district court's decision which dismissed as moot the appeal of an unstayed financing order. Instead of limiting its analysis to the type of order at hand, the Seventh Circuit focused its attention first on whether the questioned provision in the loan was permissible. In *EDC*, a portion of the loan was to be used to pay creditors' attorneys in the context of a settlement of litigation. 676 F.2d at 948-49. This had the effect of using bankruptcy estate money to pay obligations that creditors owed to their own lawyers, that otherwise the estate could not pay. *Id.* at 947-48. As such, the provision was improper and was reversed, notwithstanding the absence of a stay. "If the lender knows his priority is invalid but proceeds anyway in the hope that a stay will not be sought or if sought will not be granted, we cannot see how he can be thought to be acting in good faith". *Id.* at 947. Furthermore, "[w]here it is evident from the loan agreement that the transaction has an intended effect that is improper under the Bankruptcy Code, the lender is not in good faith, and it is irrelevant what the improper purpose is". *Id.* at 948. Hence, even absent a stay, an offensive provision in a lending agreement was reversed.

The Third Circuit aligned itself with the Seventh and Eleventh Circuits in *Resolution Trust Corp. v. Swedeland Development Group, Inc. (In re Swedeland Development Group, Inc.)*, 16 F.3d 552 (3d Cir. 1994), when it expressly rejected the analysis of the Sixth and Ninth Circuits. In *Swedeland*, the Third Circuit confronted financing orders

that would have granted the new lender priority to the collateral ahead of persons with pre-existing, perfected liens against the same collateral under § 364(d). Hence, even though the provision confronting the Third Circuit was not one utterly foreign to bankruptcy law, as were the questioned provisions in *EDC, Ellingser* and *Revco*, and as were the provisions before the Ninth Circuit here and in *Adams Apple*, the Third Circuit allowed an appellate challenge to the questioned provision, even absent a stay, because the provision could not have had its roots in § 364. Hence, the *Swedeland* court recognized exactly the mischief predicted by the dissents in *Ellingser* and *Revco*, and refused to avoid looking at the merits of the challenged question.

B. *The Mischief in the View of the Sixth and Ninth Circuits.*

This case personifies the worst imaginings of Judges Merritt and Hull in their respective dissents in *Ellingser* and *Revco*. Judge Hull, in particular, was concerned with precluding from review "any arrangement, even an illegal one" by the expedient of including the illegal term in a financing order. 901 F.2d at 1367 (Hull, C.D.J., dissenting).

While the disparate treatment of equally ranked administrative claimants may not quite rise to the level of being "illegal", it is plainly improper under the Bankruptcy Code. Ironically, the Ninth Circuit's own precedent makes this clear. *See Feder v. Lazar (In re Lazar)*, 83 F.3d 306, 310 (9th Cir. 1996) (reversing a district court order that required an examiner's fees to be paid ahead of equally ranked debtor's attorneys' fees). Yet the Ninth Circuit would not even address a provision it essentially knew was improper because of its adherence to its automatic mootness doctrine.

There appears to be no limit to what the Ninth and Sixth Circuit would allow, as long as a debtor and a lender (or a trustee and a lender) team up to include a provision in a financing order. For example, it is easy to envision a lender "requiring", under the guise of conserving post-petition funding, that a trustee's attorney be paid without filing a fee application or submitting her fees for the bankruptcy court's review, since time spent preparing applications is compensable and the usage of loan funds for that purpose would not really benefit the lender. On the other hand, the Bankruptcy Code explicitly requires a professional, including the trustee, to file a formal application for fees with the court, directing the court to consider time, as well as the nature, extent and value of services rendered, in evaluating applications for compensation. *See* 11 U.S.C. § 330; *In re Nucorp Energy, Inc.*, 764 F.2d 655, 659 (9th Cir. 1985) (courts cannot ignore the direct mandate of Section 330(a) that reasonable compensation be provided for "actual, necessary" services, including preparation of fee applications under § 330).

Could such a provision, that would dramatically upset the established compensation system in bankruptcy cases, be approved, or allowed, just because it is included in a "financing order" that was not stayed? To state the proposition seems to be to negate it, yet plainly that could occur under *Adams Apple*, as interpreted and reaffirmed in this case, and under *Ellingser* and *Revco*.

C. *The Ninth Circuit's Decision Is Fundamentally Flawed.*

The plain language of § 364(c) allows for relief on behalf of Petitioner, and the Ninth Circuit's dismissal of the

entire appeal as "moot" because Petitioner did not obtain a stay pending the appeal is fundamentally flawed. As a practical matter, a stay that freezes the entirety of a financing arrangement would be nearly impossible to obtain. Such financing is almost always obtained in urgent, distressed circumstances that have wide ranging impact and the need to keep a debtor alive will almost certainly outweigh the interests at stake in challenging a narrow deal component such as the Fee Disbursement Provision in this case. Hence, a stay will almost never issue and inappropriate provisions will never be scrutinized in the Sixth and Ninth Circuits.

This is precisely why the statute merely limits the remedies available upon reversal or modification of a financing order, and does not require the drastic result of blanket dismissal absent a stay pending appeal, which has occurred in this case. An appellate ruling reversing the BAP's decision would not have affected the debt or security provided to the post-petition lender. Therefore, relief was available to Petitioner under § 364(e). A plain reading of the statute would not expand the statute's application beyond what the drafters intended, and would produce a result that works hand-in-hand with the other provisions of the Bankruptcy Code, which prohibits subordination of otherwise equally ranked administrative expenses. In the circumstances presented here, a plain review of the statute reveals that the Ninth Circuit's reasoning is fundamentally flawed.

VII.

CONCLUSION

This case presents this Court with the opportunity to not only resolve a sharp split among the circuits, it does so in the business bankruptcy environment, upon an issue that affects how billions of dollars of loan deals are, or should be, negotiated. The Court is thus urged to grant certiorari so it can resolve the split among the circuits and finally resolve this important public issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 13, 2005 AND AMENDED DECEMBER 7, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-56818

BAP No.
CC-03-01090-PKD

In re: COOPER COMMONS, LLC,

Debtor,

WEINSTEIN, EISEN & WEISS, LLP,

Appellant,

v.

DAVID A. GILL, CHAPTER 11 TRUSTEE; COMERICA BANK,

Appellees.

Bankruptcy Appellate Panel
Perris, Klein, and Dunn, Bankruptcy Judges, Presiding

Appendix A

Argued and Submitted
May 4, 2005—Pasadena, California

Filed September 13, 2005
Amended December 7, 2005

Before: Diarmuid F. O'Scannlain and
Kim McLane Wardlaw, Circuit Judges, and
Charles C. Lovell,* District Judge.

Opinion by Judge O'Scannlain

ORDER AND AMENDED OPINION

ORDER

The Court *sua sponte* recalls the mandate issued on November 18, 2005. The opinion filed on September 13, 2005, and reported at 424 F.3d 963, is hereby amended. The amended opinion is filed concurrently with this order. The Court directs the Clerk to reissue the mandate forthwith.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a lender to a bankrupt condominium development can effectively specify that post-petition loans it makes may be used only for certain purposes.

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* The Honorable Charles C. Lovell, United States District Judge for the District of Montana, sitting by designation.

Appendix A

I

Cooper Commons, LLC, voluntarily entered Chapter 11 bankruptcy on February 22, 2002. Its business consisted of the construction and sale of a 62-unit condominium development in West Hollywood, California. Its principal creditor was Comerica Bank, which has a senior security interest in the development.

Cooper Commons acted as debtor-in-possession for nine months, until the appointment of David A. Gill as trustee. During this period, Weinstein, Eisen and Weiss, LLP, ("the Weinstein firm"), acted as its general counsel and helped Cooper Commons negotiate three agreements, or stipulations, with Comerica Bank for continued financing necessary to the completion of the condominiums.

In the first stipulation, Comerica agreed that Cooper Commons could use some $50,000 of such continued financing to pay for the services of retained professionals like the Weinstein firm. This provision carried over into the other two stipulations.

On January 3, 2003, Gill, as trustee, filed a motion asking the bankruptcy court to approve additional financing from Comerica. Gill explained that he needed roughly $4.25 million to finish construction on the condominiums, plus an additional $888,469 to pay for "the reasonable value of the services *provided and to be provided by [Gill] and his professionals* " (emphasis added). Gill attached a spreadsheet to the motion breaking down the estimated services, which were apportioned between Gill and the various professionals

that he had hired. No mention was made of the Weinstein firm. In due course the Weinstein firm received a copy of Gill's January 3 motion and the attached spreadsheet.

The bankruptcy court set the motion for hearing on February 5, 2003 and ordered Gill to circulate notice. Gill's notice was circulated on January 21, 2003, and stated that full details of the subject matter of the hearing could be found in the January 3 motion and attachments. In due course the Weinstein firm received the January 21 notice.

On January 31, 2003, Gill filed and circulated a final version of the specific financing agreement he proposed for approval. He now sought a total of $5,741,220 in loans, although the portion set aside for his expenses, and the expenses of his professionals, was still set at $888,469. In due course the Weinstein firm received this January 31 document.

At the February 5, 2003, hearing, the Weinstein firm objected to the proposed arrangement in which the $888,469 was set aside only for the trustee and his professionals, excluding the Weinstein firm and other prior professionals of the bankruptcy estate. The Weinstein firm also objected to what it felt was inadequate notice, since it stated that (1) it had not received the January 31 document until February 3, 2003, and (2) the January 3 motion and the January 21 notice had not stated with adequate clarity that the Weinstein firm would not be paid out of the proposed loan.

The bankruptcy court rejected the Weinstein firm's arguments and entered a final order approving the proposed

financing. The bankruptcy judge found that "the post-petition financing has been negotiated in good faith and at arms'-length. . . . Any credit extended . . . shall be deemed to have been extended . . . in good faith. . . ." The bankruptcy judge also found that the proposed financing arrangement was fair and reasonable; that the bankruptcy estate's value increased because of it but would decrease without it; and that it left none of the bankruptcy estate's creditors worse off than they would have otherwise been.

The Weinstein firm appealed to the Bankruptcy Appellate Panel "BAP"), which held that the firm had not been denied due process, because the January 3 and January 21 filings had provided sufficient notice, and rejected the firm's substantive claims because it had not adequately raised them before the bankruptcy court. From that BAP order, the Weinstein firm filed this timely appeal.

II

The Weinstein firm first claims a due process violation based on its alleged late notice that it would be shut out from the distribution of the $888,469.

This argument fails. The information that the Weinstein firm received on January 31 was not materially different from the January 3 motion, which set forth how the sum would be used. The January 3 motion expressly provided that

> [i]n addition, the Trustee estimates that the expenses to the estate for the reasonable value of the services *provided and to be provided by*

> *himself and his professionals* for the legal and administrative tasks required directly related to construction, marketing and sales . . . as well as those tasks relating to the duties required of the Trustee . . . will amount to approximately $888,469. . . .

(emphasis added). In fact, the spreadsheet attached to the January 3 motion carefully itemized the various expenses that Gill and his various professionals had incurred or would incur and the Weinstein firm was not listed. The Weinstein firm's arguments that the January 3 motion provided less information than the January 31 document are without merit.

At best, the Weinstein firm was entitled to notice reasonably calculated to inform it that the additional funds from Comerica would be applied only to Gill and his professionals, with such notice given sufficiently ahead of the hearing date that it could prepare objections. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). We are satisfied that the Weinstein firm was on notice of its exclusion from the proposed financing arrangement when it received the January 3 motion. There was no due process violation.

III

The Weinstein firm also contends that the financing arrangement would violate 11 U.S.C. § 507(a)(1) because that section gives equal priority to the administrative claimants like Gill, his professionals, and the Weinstein firm while the financing arrangement does not. Because the

financing arrangement is a post-bankruptcy extension of credit under 11 U.S.C. § 364, Gill and Comerica respond that the Weinstein firm's substantive claims are mooted by 11 U.S.C. § 364(e) which provides as follows:

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, *does not affect the validity of any debt so incurred,* or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

Id. (emphasis added). Thus, they contend, Weinstein has no remedies because it failed to obtain a stay of the bankruptcy court's order pending the appeal and because the bankruptcy court expressly found that Comerica extended credit in good faith. Weinstein's claim is therefore mooted, they urge, because any relief the Weinstein firm seeks would "affect the validity of [the] debt." *See Bennett v. Gemmill (In re Combined Metals Reduction Co.),* 557 F.2d 179, 187 (9th Cir.1977) (holding that appeals are moot when appellate courts can provide no effective relief).

A

Specifically, the Weinstein firm seeks three different kinds of relief. It first asks that we declare the financing

agreement invalid and order Gill and Comerica to renegotiate, this time without ignoring the claims of the bankruptcy estate's prior professionals. Second, as an alternative, it asks us to order that the $888,469 earmarked for Gill and his professionals be distributed pro rata among *all* the administrative claimants, including the Weinstein firm, or even that it be given a larger share. Third, in yet another alternative, it requests that we order Comerica to loan additional money sufficient to cover the Weinstein firm's demands, subject to the same terms as in the existing loan.

1

The first relief sought—invalidating the financing agreement—would clearly "affect the validity of any debt incurred" and therefore fails, mooted by § 364(e).

2

What about the second and the third claims for relief? We held in *In re Adam's Apple, Inc.*, 829 F.2d 1484 (9th Cir.1987), that § 364(e) broadly protects any requirement or obligation that was part of a post-petition creditor's agreement to finance.[1] At issue in *In re Adam's Apple* was an

1. Two of our sister circuits have adopted our approach. *See In re Ellingsen MacLean Oil Co., Inc.*, 834 F.2d 599, 600-01 (6th Cir.1987) (where a bank extended post-petition financing in return for the waiver of any right to challenge its pre-petition liens, extending the protection of § 364(e) to both the post-petition debt and the waiver); *In re Revco D.S., Inc.*, 901 F.2d 1359, 1364 (6th Cir.1990) (explaining that in "reviewing financing orders subject to section 364(e) [courts] have been reluctant to sever individual

(Cont'd)

interim financing agreement in which Central Washington Bank agreed to advance $450,000 in funds to an apple-grower debtor, in exchange for converting the bank's pre-petition unsecured debt to secured debt. *Id.* at 1486. The court explained that it could not reach the legality of cross-collateralization until it first decided whether the case was moot, i.e., whether there was any available remedy not barred by § 364(e). *Id.* at 1489 n. 7. It concluded it could not invalidate the new security that had been granted Central Washington Bank without "affect[ing] the validity" of the new debt. The court reasoned that "[s]ection 364 was designed to provide a debtor a means to obtain credit after filing bankruptcy," and therefore that any agreements or conditions necessary to obtain that credit were protected by § 364(e). *Id.* at 1488. The court explained, citing *Matter of EDC Holding Company,* 676 F.2d 945, 947 (7th Cir .1982), that "the purpose of 364(e) was to overcome a good faith lender's reluctance to extend financing in a bankruptcy context by permitting reliance on a bankruptcy judge's authorization." *Id.* Since protecting the validity of any clause of the debt agreement that might have motivated the creditor to extend the credit served this purpose, it followed that § 364(e) protected the cross-collateralization clauses and the appeal was indeed moot. *Id.*

(Cont'd)

provisions"); *In re Western Pacific Airlines, Inc.,* 181 F.3d 1191, 1195 (10th Cir.1999) (holding that " § 364(e) prohibits not only outright invalidation of a lien or priority . . . , but also modification of the terms"). *But see Matter of Saybrook Mfg. Co., Inc.,* 963 F.2d 1490 (11th Cir.1992).

In the case before us, it follows that any provisions of the financing agreement that Comerica might have bargained for or that helped to motivate its extension of credit are protected by § 364(e). The provisions that would be affected by the Weinstein firm's second and third proposed remedies—those directing that up to $888,469 go to Gill and his professionals, requiring that unused funds be returned to Comerica, and setting the total loan amount—are just such provisions. Comerica's motive in lending money was to ensure the completion of the condominium project; payments to professionals whose services were no longer retained would not likely help. Further, since any unused funds were to be returned to Comerica, it was clearly in Comerica's interest to limit the number of claimants. Comerica's interest in loaning only the amount it agreed on and not some larger sum is also transparent. We conclude that the financing agreement cannot be undone, the $888,469 cannot be ordered redistributed, and the loan amount cannot be adjusted upward—and therefore that Weinstein's second and third requested forms of relief are also unavailable.

B

Since the Weinstein firm has failed to secure a stay, all that remains under § 364(e) is to review whether Comerica acted in good faith. The bankruptcy court expressly found that Comerica had:

> Based on the record presented to the Court, the post-petition financing from Comerica has been negotiated in good faith and at arms'-length between the Trustee and Comerica. Any credit

> extended and loans made to the Trustee pursuant to the DIP Financing Agreement shall be deemed to have been extended or made, as the case may be, in good faith as required by, and within the meaning of, Bankruptcy Code § 364(e).

We independently review the bankruptcy court's finding for clear error. *In re Casserino,* 379 F.3d 1069, 1072 (9th Cir.2004). The court's finding is supported by numerous declarations by Comerica and the Trustee, describing the need for additional financing to complete the project, the efforts made to analyze the amount necessary to complete the work, and the parties' subjective beliefs that the agreement was negotiated at arms' length and would be in the best interest of the estate and its creditors. The bankruptcy court's finding that Comerica acted in good faith for the purposes of § 364(e) was not clearly erroneous.

Section 364(e) moots Weinstein's substantive claims.

IV

The Weinstein firm received adequate notice of the financing agreement and its substantive objections to the agreement are moot.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 13, 2005

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 03-56818

In re
COOPER COMMONS, LLC,

Debtor,

WEINSTEIN, EISEN & WEISS, LLP,

Appellant,

v.

DAVID A. GILL, CHAPTER 11 TRUSTEE;
COMERICA BANK,

Appellees.

Argued and Submitted May 4, 2005.
Filed Sept. 13, 2005

O'SCANNLAIN, Circuit Judge.

We must decide whether a lender to a bankrupt condominium development can effectively specify that post-petition loans it makes may be used only for certain purposes.

Appendix B

I

Cooper Commons, LLC, voluntarily entered Chapter 11 bankruptcy on February 22, 2002. Its business consisted of the construction and sale of a 62-unit condominium development in West Hollywood, California. Its principal creditor was Comerica Bank, which has a senior security interest in the development.

Cooper Commons acted as debtor-in-possession for nine months, until the appointment of David A. Gill as trustee. During this period, Weinstein, Eisen and Weiss, LLP, ("the Weinstein firm"), acted as its general counsel and helped Cooper Commons negotiate three agreements, or stipulations, with Comerica Bank for continued financing necessary to the completion of the condominiums.

In the first stipulation, Comerica agreed that Cooper Commons could use some $50,000 of such continued financing to pay for the services of retained professionals like the Weinstein firm. This provision carried over into the other two stipulations.

On January 3, 2003, Gill, as trustee, filed a motion asking the bankruptcy court to approve additional financing from Comerica. Gill explained that he needed roughly $4.25 million to finish construction on the condominiums, plus an additional $888,469 to pay for "the reasonable value of the services *provided and to be provided by [Gill] and his professionals*" (emphasis added). Gill attached a spreadsheet to the motion breaking down the estimated services, which were apportioned between Gill and the various professionals

that he had hired. No mention was made of the Weinstein firm. In due course the Weinstein firm received a copy of Gill's January 3 motion and the attached spreadsheet.

The bankruptcy court set the motion for hearing on February 5, 2003 and ordered Gill to circulate notice. Gill's notice was circulated on January 21, 2003, and stated that full details of the subject matter of the hearing could be found in the January 3 motion and attachments. In due course the Weinstein firm received the January 21 notice.

On January 31, 2003, Gill filed and circulated a final version of the specific financing agreement he proposed for approval. He now sought a total of $5,741,220 in loans, although the portion set aside for his expenses, and the expenses of his professionals, was still set at $888,469. In due course the Weinstein firm received this January 31 document.

At the February 5, 2003, hearing, the Weinstein firm objected to the proposed arrangement in which the $888,469 was set aside only for the trustee and his professionals, excluding the Weinstein firm and other prior professionals of the bankruptcy estate. The Weinstein firm also objected to what it felt was inadequate notice, since it stated that (1) it had not received the January 31 document until February 3, 2003, and (2) the January 3 motion and the January 21 notice had not stated with adequate clarity that the Weinstein firm would not be paid out of the proposed loan.

Appendix B

The bankruptcy court rejected the Weinstein firm's arguments and entered a final order approving the proposed financing. The bankruptcy judge found that "the post-petition financing has been negotiated in good faith and at arms'-length. . . . Any credit extended . . . shall be deemed to have been extended . . . in good faith. . . ." The bankruptcy judge also found that the proposed financing arrangement was fair and reasonable; that the bankruptcy estate's value increased because of it but would decrease without it; and that it left none of the bankruptcy estate's creditors worse off than they would have otherwise been.

The Weinstein firm appealed to the Bankruptcy Appellate Panel ("BAP"), which held that the firm had not been denied due process because the January 3 and January 21 filings had provided sufficient notice, and rejected the firm's substantive claims because it had not adequately raised them before the bankruptcy court. From that BAP order, the Weinstein firm filed this timely appeal.

II

The Weinstein firm first claims a due process violation based on its alleged late notice that it would be shut out from the distribution of the $888,469.

This argument fails. The information that the Weinstein firm received on January 31 was not materially different from the January 3 motion, which set forth how the sum would be used. The January 3 motion expressly provided that

> [i]n addition, the Trustee estimates that the expenses to the estate for the reasonable value of

> the services *provided and to be provided by himself and his professionals* for the legal and administrative tasks required directly related to construction, marketing and sales ... as well as those tasks relating to the duties required of the Trustee . . . will amount to approximately $888,469. . . .

(emphasis added). In fact, the spreadsheet attached to the January 3 motion carefully itemized the various expenses that Gill and his various professionals had incurred or would incur and the Weinstein firm was not listed. The Weinstein firm's arguments that the January 3 motion provided less information than the January 31 document are without merit.

At best, the Weinstein firm was entitled to notice reasonably calculated to inform it that the additional funds from Comerica would be applied only to Gill and his professionals, with such notice given sufficiently ahead of the hearing date that it could prepare objections. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 94 L.Ed. 865 (1950). We are satisfied that the Weinstein firm was on notice of its exclusion from the proposed financing arrangement when it received the January 3 motion. There was no due process violation.

III

The Weinstein firm also contends that the financing arrangement would violate 11 U.S.C. § 507(a)(1) because that section gives equal priority to the administrative claimants like Gill, his professionals, and the Weinstein firm

while the financing arrangement does not. Because the financing arrangement is a post-bankruptcy extension of credit under 11 U.S.C. § 364, Gill and Comerica respond that the Weinstein firm's substantive claims are mooted by 11 U.S.C. § 364(e) which provides as follows:

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, *does not affect the validity of any debt so incurred*, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

Id. (emphasis added). Thus, they contend, Weinstein has no remedies because it failed to obtain a stay of the bankruptcy court's order pending the appeal and because the bankruptcy court expressly found that Comerica extended credit in good faith. Weinstein's claim is therefore mooted, they urge, because any relief the Weinstein firm seeks would "affect the validity of [the] debt." *See Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 187 (9th Cir.1977) (holding that appeals are moot when appellate courts can provide no effective relief).

Appendix B

A

Specifically, the Weinstein firm seeks three different kinds of relief. It first asks that we declare the financing agreement invalid and order Gill and Comerica to renegotiate, this time without ignoring the claims of the bankruptcy estate's prior professionals. Second, as an alternative, it asks us to order that the $888,469 earmarked for Gill and his professionals be distributed pro rata among *all* the administrative claimants, including the Weinstein firm, or even that it be given a larger share. Third, in yet another alternative, it requests that we order Comerica to loan additional money sufficient to cover the Weinstein firm's demands, subject to the same terms as in the existing loan.

1

The first relief sought—invalidating the financing agreement—would clearly "affect the validity of any debt incurred" and therefore fails, mooted by § 364(e).

2

What about the second and the third claims for relief? We held in *In re Adams Apple, Inc.*, 829 F.2d 1484 (9th Cir.1987), that § 364(e) broadly protects any requirement or obligation that was part of a post-petition creditor's agreement to finance.[1] At issue in *In re Adams Apple* was an

1. Two of our sister circuits have adopted our approach. *See In re Ellingsen MacLean Oil Co., Inc.*, 834 F.2d 599, 600-01 (6th Cir.1987) (where a bank extended post-petition financing in (Cont'd)

interim financing agreement in which Central Washington Bank agreed to advance $450,000 in funds to an apple-grower debtor, in exchange for converting the bank's pre-petition unsecured debt to secured debt. *Id.* at 1486. The court explained that it could not reach the legality of cross-collateralization until it first decided whether the case was moot, i.e., whether there was any available remedy not barred by § 364(e). *Id.* at 1489 n. 7. It concluded it could not invalidate the new security that had been granted Central Washington Bank without "affect[ing] the validity" of the new debt. The court reasoned that "[s]ection 364 was designed to provide a debtor a means to obtain credit after filing bankruptcy," and therefore that any agreements or conditions necessary to obtain that credit were protected by § 364(e). *Id.* at 1488. The court explained, citing *Matter of EDC Holding Company*, 676 F.2d 945, 947 (7th Cir.1982), that "the purpose of 364(e) was to overcome a good faith lender's reluctance to extend financing in a bankruptcy context by permitting reliance on a bankruptcy judge's authorization." *Id.* Since protecting the validity of any clause of the debt agreement that might have motivated the creditor

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(Cont'd)

return for the waiver of any right to challenge its pre-petition liens, extending the protection of *§ 364(e)* to both the post-petition debt and the waiver); *In re Revco D.S., Inc.*, 901 F.2d 1359, 1364 (6th Cir.1990) (explaining that in "reviewing financing orders subject to section 364(e) [courts] have been reluctant to sever individual provisions"); *In re Western Pacific Airlines, Inc.*, 181 F.3d 1191, 1195 (10th Cir.1999) (holding that "§ 364(e) prohibits not only outright invalidation of a lien or priority . . . , but also modification of the terms"). *But see Matter of Saybrook Mfg. Co., Inc.*, 963 F.2d 1490 (11th Cir.1992).

to extend the credit served this purpose, it followed that § 364(e) protected the cross-collateralization clauses and the appeal was indeed moot. *Id.*

In the case before us, it follows that any provisions of the financing agreement that Comerica might have bargained for or that helped to motivate its extension of credit are protected by § 364(e). The provisions that would be affected by the Weinstein firm's second and third proposed remedies—those directing that up to $888,469 go to Gill and his professionals, requiring that unused funds be returned to Comerica, and setting the total loan amount—are just such provisions. Comerica's motive in lending money was to ensure the completion of the condominium project; payments to professionals whose services were no longer retained would not likely help. Further, since any unused funds were to be returned to Comerica, it was clearly in Comerica's interest to limit the number of claimants. Comerica's interest in loaning only the amount it agreed on and not some larger sum is also transparent. We conclude that the financing agreement cannot be undone, the $888,469 cannot be ordered redistributed, and the loan amount cannot be adjusted upward—and therefore that Weinstein's second and third requested forms of relief are also unavailable.

B

Since the Weinstein firm has failed to secure a stay, all that remains under § 364(e) is to review whether Comerica acted in good faith. "[T]o determine good faith we look to the integrity of an actor's conduct during the proceedings.

Appendix B

Misconduct defeating good faith includes fraud, collusion, or an attempt to take grossly unfair advantage of others. A creditor fails to act in good faith if it acts for an improper purpose. Knowledge of the illegality of a transaction also defeats good faith." *In re Adam' Apple*, 829 F.2d at 1489 (citations and internal marks of quotation omitted). Importantly, *In re Adams Apple* establishes that we presume the post-bankruptcy creditor's good faith and then inquire to see whether the presumption can be overcome. *See id.* at 1490-91. *In re Adams Apple* rejected the appellant's argument that, because of the "fundamental tenet of bankruptcy law that like creditors must be treated alike," the creditor had known it was acting illegally in asking for priority treatment of its pre- petition debt in return for its post-petition loan. *Id.* at 1490. Since this is essentially the same as the Weinstein firm's argument that Comerica must have believed it was acting illegally in treating Gill and his professionals differently from the bankruptcy estate's prior professionals, the Weinstein firm's lack-of-good-faith argument on that count fails. Similarly, *In re Adams Apple* also rejected appellant's argument that the bank acted in bad faith because it entered into the financing agreement even though other creditors objected. *Id.* at 1491. Thus, Comerica is entitled to a presumption of good faith. In any event, the bankruptcy court made an express finding that Comerica acted in good faith.

Remarkably, the BAP rejected both the *In re Adams Apple* presumption and the bankruptcy court's finding, erroneously concluding that Comerica bore the burden to demonstrate good faith because of *M Capital Corp.*, 290 B.R. 743 (9th

Cir.BAP2003).[2] But a BAP ruling cannot override circuit precedent, and *M Capital Corp.* may not be preferred to *In re Adams Apple.*

As we held in *In re Casserino*, 379 F.3d 1069, 1072 (9th Cir.2004), on appeal from the BAP, we independently review the bankruptcy court's findings for clear error. While the BAP held that the bankruptcy court's good-faith finding was clearly erroneous, it pointed to no specific evidence in the record suggesting bad faith and failed to acknowledge that the bankruptcy court had repeated dealings with the parties and was in a position to judge their motives and character. We therefore defer to the bankruptcy court's finding that Comerica acted in good faith for the purposes of § 364(e).

Section 364(e) moots Weinstein's substantive claims.

IV

The Weinstein firm received adequate notice of the financing agreement and its substantive objections to the agreement are moot.

AFFIRMED IN PART; DISMISSED IN PART.

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2. *M Capital Corp.* was interpreting 11 U.S.C. § 363(m), not § 364(e), but the two sections have nearly identical language and are to be interpreted in tandem. *See In re Adams Apple*, 829 F.2d at 1489.

APPENDIX C — MEMORANDUM OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT FILED AUGUST 19, 2003

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP No. CC-03-1090-PKD

Bk. No. LA 02-15392 BR

In re:

COOPER COMMONS, LLC,

Debtor.

WEINSTEIN, EISEN, WEISS & ROTHSCHILD, LLP,

Appellant,

v.

DAVID A. GILL, Chapter 11 Trustee; COMERICA BANK,

Appellees.

Appendix C

MEMORANDUM[1]

Argued and Submitted on
July 23, 2003 at Pasadena, California

Filed – August 19, 2003

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Barry Russell, Bankruptcy Judge, Presiding

Before: PERRIS, KLEIN and DUNN,[2] Bankruptcy Judges.

Weinstein, Eisen, Weiss and Rothschild LLP (the firm) appeals a bankruptcy court order that approved the third and fourth amendments to a stipulation for additional financing for chapter 11[3] debtor Cooper Commons, LLC. The firm, which holds an administrative claim for legal services it had provided to debtor in possession before the trustee was appointed, challenges the provision in the fourth amendment

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. *See* 9th Cir. BAP Rule 8013-1.

2. Hon. Randall L. Dunn, Bankruptcy Judge for the District of Oregon, sitting by designation.

3. Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

that sets aside $888,469 of the loan amount for payment of the chapter 11 trustee and his professionals. We AFFIRM.

FACTS

Before debtor filed its chapter 11 petition in February 2002, it had obtained financing from Comerica Bank (Comerica) for construction of a condominium project.[4] After bankruptcy, debtor, acting as debtor in possession, obtained court approval for additional funding of the project by Comerica. The Third Stipulation for Financing Under Construction Loan Agreement and Adequate Protection (Third Stipulation) was approved on October 21, 2002.

In November 2002, David A. Gill was appointed trustee for the estate. In early January 2003, the court approved two amendments to the Third Stipulation.

On January 21, 2003, the trustee issued and served a notice of final hearing on a motion for additional financing. The hearing was set for February 5, 2003. The notice refers to a "Supplement of David A. Gill, to Motion of Chapter 11 Trustee to Approve Second Amendment to Third Stipulation for Financing Under Construction Loan Agreement and Adequate Protection and Emergency Motion for Further Financing" (the Supplement) for a description of the request for additional financing. Notice of Final Hearing on Trustee's Motion for Final Approval of Additional Financing at 1. Both

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4. Debtor also was in the process of completing a project to rehabilitate property located on Fountain Avenue for use as low income housing. The Fountain project is not relevant to this appeal.

the notice and the Supplement indicated that the trustee expected to borrow approximately $5,148,610 for completion of the condominium project, but the precise amounts and terms of the financing would be set out in documentation to be filed before the hearing. The $5,148,610 included $888,469 for the trustee and his professionals for costs related to completion of the construction project.

The trustee served a Notice of Filing of Fourth Amendment to Third Stipulation on January 31, 2003. This notice contained the specific language relating to the use of $888,469 of the financing for payment of the costs of the trustee and his professionals related to the construction.

The court held the hearing as scheduled on February 5. Over the firm's objection, it approved the fourth amendment to the Third Stipulation, which allowed the trustee to borrow more than $7,000,000.

The firm timely appeals. It does not challenge the court's approval of the financing itself, but only the provision in the fourth amendment that allows $888,469 to be used to pay the expenses of the trustee and the trustee's professionals related to completion of the project.

ISSUES

1. Whether the appeal is moot.

2. Whether the firm has standing to appeal.

3. Whether the court denied the firm due process.

4. Whether the bankruptcy court erred in authorizing postpetition financing under § 364 that included a carve-out for administrative expenses of the trustee and his professionals.

STANDARDS OF REVIEW

Whether the bankruptcy court violated the firm's due process rights is a mixed question of law and fact, which we review de novo. *In re La Sierra Fin. Serv., Inc.*, 290 B.R. 718, 726 (9th Cir. BAP 2002); *In re Cal. Fid., Inc.*, 198 B.R. 567, 571 (9th Cir. BAP 1996).

The bankruptcy court's approval of the fourth amendment to the Third Stipulation was pursuant to § 364(c), which provides that the court "may" authorize postpetition financing under certain circumstances.[5] The use of the word "may" indicates that the court's action is discretionary, and therefore we review for abuse of discretion. A court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous finding. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061, 1065 (9th Cir. 2001); *In re Medina*, 205 B.R. 216, 200 (9th Cir. BAP 1996).

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5. To the extent the financing was approved under § 364(d), the same standard would apply. The order on appeal refers only to § 364(c), but the Third Stipulation, which the amendment at issue here amends, refers as well to § 364(d). Third Stipulation for Financing at 10 (attached as exhibit to Debtor's Third Motion for Authority to Incur Additional Financing). Whether the approval was under § 364(c) or 364(d) does not affect the issues in this appeal.

Appendix C

DISCUSSION

1. *Mootness*

Comerica and the trustee argue in passing that this appeal is moot under § 364(e), because the firm did not obtain a stay pending appeal.[6] The order in this case approved postpetition financing pursuant to § 364. Section 364(e) provides:

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

The parties do not dispute that § 364(e) effectively precludes appellate review of bankruptcy court orders that are within its scope.

Although the firm did not obtain a stay pending appeal, it argues that this appeal is not statutorily moot for two reasons. First, it claims that § 364(e) does not apply because

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6. They do not claim that the appeal is moot under either constitutional or equitable mootness principles.

the firm is challenging only "the disposition of some of the money" included in the order, Appellant's Reply Brief at 5, and is not attacking the funding under the order or the postpetition claim and lien rights created by the agreement that was approved by the court order. Second, the firm argues that there was no affirmative proof of good faith, as required by *In re M Capital Corp.*, 290 B.R. 743 (9th Cir. BAP 2003), so § 364(e) does not apply to preclude review of the financing order.

We need not decide whether § 364(e) applies to an appeal that challenges only the distribution of loan proceeds rather than a loan itself or liens or priorities granted under § 364, because we agree that, if § 364(e) could apply in this circumstance, there is a failure of proof of good faith.[7]

Section 364(e) applies only where the lender extended credit in good faith. In *M Capital Corp.*, we considered a motion to dismiss based on § 363(m), which applies to appeals of sale orders and contains good faith language nearly identical to the language of § 364(e). The bankruptcy court had not made any findings of good faith in connection with approval of the sale, and the parties had withdrawn their motion in which they had sought a finding on that issue.

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7. The Ninth Circuit appears to view § 364(e) as barring review of a financing order, even if the provisions that are being attacked are not specifically provided for in § 364(e). *See In re Adams Apple, Inc.*, 829 F.2d 1484 (9th Cir. 1987). This approach has been criticized by treatise writers, 2 James F. Queenan, Jr., Philip J. Hendel & Ingrid M. Hillinger, *Chapter 11 Theory and Practice* § 13.58, 13.59 (1994), and rejected by the Eleventh Circuit, *In the Matter of Saybrook Mfg. Co., Inc.*, 963 F.2d 1490 (11th Cir. 1992).

Appendix C

We concluded that § 363(m) did not limit the appellant's remedies on appeal in the absence of a bankruptcy court finding that the purchaser had acted in good faith. Because there was no such finding in that case, § 363(m) did not preclude our consideration of the challenge to the sale order.

Unlike in *M Capital Corp.*, in this case the bankruptcy court specifically made a finding of good faith. The order says:

> Based on the record presented to the Court, the post-petition financing from Comerica has been negotiated in good faith and at arms'-length between the Trustee and Comerica. Any credit extended and loans made to the Trustee pursuant to the DIP Financing Agreement shall be deemed to have been extended or made, as the case may be, in good faith as required by, and within the meaning of, Bankruptcy Code § 364(e).

Order Approving Third and Fourth Amendments to Third Stipulation for Financing, entered on February 6, 2003, at 6. In light of the explicit finding of good faith, the firm's reliance on *M Capital Corp.* is misplaced.

Nonetheless, the firm's argument raises the question of whether there is evidence to support the court's finding of good faith. Good faith is a factual determination that we review for clear error. *See In re Thomas,* 287 B.R. 782, 785 (9th Cir. BAP 2002) (reviewing good faith under § 363(m)).

Appendix C

"Good faith" is not defined in the Bankruptcy Code. We have adopted the Seventh Circuit standard for good faith in connection with § 364(e) issues:

> We assume [§ 364(e)] was intended to protect not the lender who seeks to take advantage of a lapse in oversight by the bankruptcy judge but the lender who believes his priority is valid but cannot be certain that it is, because of objections that might be upheld on appeal. If the lender *knows* his priority is invalid but proceeds anyway in the hope that a stay will not be sought or if sought will not be granted, we cannot see how he can be thought to be acting in good faith.

In re Graphic Arts Lithographers, Inc., 71 B.R. 774, 776 (9th Cir. BAP 1987) (quoting *In re EDC Holding Co.*, 676 F.2d 945, 947 (7th Cir. 1982); emphasis in *EDC Holding Co.*).

The party asserting mootness under § 364(e) has the burden of showing good faith. *See M Capital Corp.*, 290 B.R. at 747 (burden of showing good faith under § 363(m) rests with party asserting it).

Before oral argument in this case, we entered an order requiring appellees to pinpoint in the excerpts of record the evidence that supports the bankruptcy court's finding of good

faith. At oral argument, counsel for Comerica provided specific references as support for the good faith finding.[8]

The bulk of the citations are to findings included in various court orders approving postpetition financing. Court findings of good faith are not evidence that can support a finding of good faith.

The remainder of the citations do not provide support for the court's good faith finding. The first is to the declaration of Ronald I. Cooper, managing member of debtor, in support of debtor in possession's third motion for authority for postpetition financing filed in October 2002. On pages 18 and 19 of that declaration, Cooper describes the progress of the condominium project and the need for additional financing to complete it, and relates his belief that completion of the project is in the best interests of the estate, Comerica, other creditors, and other entities. Cooper opines that completion of the project would benefit not only debtor, but also construction workers and suppliers, condominium purchasers and the city.

Next, Comerica cites page 6 of the declaration of David A. Gill, trustee for debtor, submitted in support of the trustee's November 2002 emergency motion for interim and final approval of an amendment to the Third Stipulation, where Gill says that "[t]he Amendment was negotiated between Comerica and me at arms' length and in good faith.

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8. Counsel also provided references to the record to support the finding that there were no other sources for financing. The evidence supporting the nonexistence of other sources of financing is not relevant to the determination of good faith.

I believe the Amendment is fair and in the best interests of the Debtor's estate and its creditors." He does not support those statements with any facts.

Finally, Comerica points to pages 18-22 of a later declaration of David Gill, submitted in support of the January 3 Supplement regarding the need for further amendments to the Third Stipulation. Gill outlines the efforts he has made to analyze what action was necessary to complete the project and his contact with a contractor who could complete the work. He discusses the projected sale price and net sale receipts, and the amount of money needed to complete the project, including funds to pay himself and professionals he intended to employ.

The first two declarations on which Comerica relies do not relate to the third and fourth amendments to the Third Stipulation, which were the subject of the approval that is before us on this appeal. Even taking all of the evidence into account, however, there is nothing that speaks to Comerica's good faith in providing the funding that was approved in the order on appeal. It was the trustee's and Comerica's burden to show good faith. Having found no evidence to support the boilerplate finding of good faith in the bankruptcy court's order, we conclude that § 364(e) does not bar our consideration of the firm's appeal.

2. *Standing*

In our preargument order, we also directed the firm to address its standing to appeal.

Appendix C

> Only a party who is "directly and adversely affected pecuniarily" by an order of the bankruptcy court may appeal. To provide standing, "the order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights." *In re P.R.T.C. Inc.*, 177 F.3d 774, 777 (9th Cir. 1999).

In re Debbie Reynolds Hotel & Casino, Inc., 255 F.3d 1061, 1066 (9th Cir. 2001). It appeared to us that the firm's position was not affected by the court's approval of the fourth amendment to the Third Stipulation. The firm was not likely to receive any distribution on account of its administrative claim if the financing was not approved, nor was it to receive any distribution under the approved fourth amendment.[9]

However, the firm's argument is that it should be entitled either to share pro rata in the amount of the loan that was carved out for the trustee and his professionals, or that we should order the parties to reopen negotiation of the carve-out provision with a view toward providing sufficient funds to allow payment of the firm's claim. We conclude that the firm has standing to appeal the order that failed to provide for any payment of its administrative claim.

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9. At oral argument, counsel for the trustee admitted that he was pursuing avoidance claims, which might produce unencumbered assets for distribution to pay some or all administrative expenses. If the trustee recovers sufficient unencumbered assets to allow for a distribution to administrative claimants, distributions to the trustee and his professionals under the fourth amendment to the Third Stipulation could have an impact on distributions to the firm from those unencumbered assets.

Appendix C

3. *Due process*

The firm argues that it was not given adequate notice of the fourth amendment to the Third Stipulation, which included the provision for payment of the trustee and his professionals.

Whether the firm was given adequate notice requires analysis of both the statutory and constitutional due process requirements.

The Bankruptcy Code allows the court to approve postpetition financing "after notice and a hearing[.]" § 364(c). "After notice and a hearing" means "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances[.]" § 102(1)(A). A motion to obtain credit "shall be made in accordance with Rule 9014[.]" Fed. R. Bankr. P. 4001(c)(1). The final hearing on the motion for postpetition financing must be at least 15 days after service of the motion. Fed. R. Bankr. P. 4001(c)(2).

The Fifth Amendment due process clause requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978).

Appendix C

According to the firm, notice in this case did not meet the constitutional standard, because the trustee did not serve his Notice of Filing of Fourth Amendment to Third Stipulation until January 31, 2003, which was the Friday before the Wednesday, February 5, hearing on the financing motion, and then service was made by mail. Therefore, the firm did not receive the notice until the Monday before the Wednesday hearing, depriving the firm of an adequate opportunity to consider the trustee's request and prepare an objection.[10]

The trustee argues that notice was adequate, because earlier notices had contained the pertinent information that put the firm on notice of the disputed provision.[11]

The only portion of the fourth amendment to the Third Stipulation to which the firm objects is the limitation of the use of the funds borrowed to pay the trustee's and trustee's professionals' costs connected with the construction project, while excluding use of the funds to pay other administrative claimants, including the firm, whose services may also have furthered completion of the construction project. The question then is whether anything in the prior notices on which the trustee relies provided sufficient notice to the firm that the borrowed funds would be used to pay only the

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10. Counsel represented to the court that he had received a form of order by electronic mail the evening before the hearing. Transcript of February 5, 2003 hearing at 3.

11. Both the January 3, 2003 Supplement and the January 21, 2003 Notice of Final Hearing were served within the time limits set by Fed. R. Bankr. P. 4001(c).

trustee's and his professionals' fees and no other administrative fees.

The trustee's Supplement, which was served on January 3 and filed on January 6, explained the need for additional financing to complete the construction project. He explained that, in addition to approximately $4,535,141 needed to pay the hard costs of completion,

> the Trustee estimates that the expense to the estate for the reasonable value of the services provided and to be provided by himself and his professionals for the legal and administrative tasks required directly related to construction, marketing and sales of the Project and the related Fountain Property, as well as those task[s] relating to duties required of the Trustee such as his 45 day report and his 1106 report, will amount to approximately $888,469 more or less ("Estate's Expenses"). (See Exhibit 2 to the Trustee's Declaration appended hereto).

Supplement of David A. Gill, to Motion of Chapter 11 Trustee to Approve Second Amendment to Third Stipulation ¶ 17. Exhibit 2 contained an itemization of the anticipated costs associated with construction completion, including a line-by-line estimate of the estate's expected costs associated with construction. That itemization contained trustee's fees and costs, fees for counsel to the trustee, fees for the trustee's accountant, along with other itemized professional expenses. Notably absent from the itemization was any line item for the firm.

Appendix C

On January 21, 2003, the trustee filed and served notice that there would be a final hearing on February 5, 2003, on the trustee's motion for final approval of additional financing, "as described in the Supplement of David A. Gill, to Motion of Chapter 11 Trustee to Approve Second Amendment to Third Stipulation for Financing. . . ." Notice of Final Hearing on Trustee's Motion for Final Approval of Additional Financing at 1. According to the notice, the financing was expected to be in the amount of $5,148,610, plus certain additional amounts for interest and interest reserves. It also said that "[t]he precise amounts and terms of the Financing will be set forth in documentation which will be filed at or before the hearing on February 5, 2003." *Id.* at 2. The notice explained that it was providing only a brief summary of the provisions of the financing, and that full details could be found in the January 3, 2003 Supplement and the pleadings and documents referred to in the Supplement.

The $5,148,610 figure is the same number given in the trustee's January 3 Supplement, and includes the $888,469 for the trustee and the trustee's professionals.

On January 31, 2003, a Friday, the trustee served by mail his Notice of Filing of Fourth Amendment to Third Stipulation. He attached an unsigned copy of the Fourth Amendment, which he believed would "ultimately be agreed upon between the parties." Notice of Filing of Fourth Amendment to Third Stipulation at 1. That amendment contained the language regarding use of the $888,469 to pay the trustee and his professionals to the exclusion of other administrative claimants, which the court finally approved at the February 5 hearing and about which the firm complains on appeal.

Appendix C

The firm claims that the provision that authorized the trustee to use the $888,469 to pay the trustee and his professionals, to the exclusion of other administrative claimants, including the firm, was not disclosed until the eve of the final hearing, when it was contained in the January 31 notice.

The record shows that the firm had notice as early as January 3 and certainly by January 21 that the trustee proposed to obtain financing from Comerica that included $888,469 for payment of the trustee's and the trustee's professionals' costs and expenses related to completion of the construction project, and that did not include amounts for payment of other administrative claims. The January 3 Supplement explained the expense to the estate of completion, which included "the reasonable value of the services provided and to be provided by (the trustee) and his professionals for the legal and administrative tasks required directly related to construction, marketing and sales of the Project and the related Fountain Property, as well as those task[s] relating to duties required of the Trustee such as his 45-Day Report and his 1106 Report. . . ." Declaration of David A. Gill ¶ 17, attached to January 3, 2003 Supplement. The itemization of the estate's costs did not include any provision for payment of administrative claims of the firm or any other administrative claimants who were not listed in the itemization.

The January 21 notice referred to the January 3 Supplement for details about the proposed financing.

Appendix C

The only additional information that was provided by the January 31 notice that was not contained in the earlier notices was the precise language of the agreement, in which the $888,469 was to be placed in an administrative fund until disbursed to the trustee and his professionals. The inclusion of the process by which the funds provided for payment of the trustee's and the trustee's professionals' expenses were to be held and distributed was not a significant departure from the earlier notices that had clearly indicated that the funds would be used for that purpose; it merely set out how the payment to the trustee and his professionals would be accomplished.

The firm argues that the January 3 and January 21 notices were inadequate because they did not say that Comerica had agreed to this financing or the carve-out provision. The January 3 Supplement says that Comerica had not yet agreed to provide additional financing, but that the trustee had requested that it do so, and that the funding might include the expenses of the trustee and his professionals. January 3, 2003 Supplement at 9. The January 21, 2003 notice indicates that the court is asked to approve the financing "as described in the [January 3] Supplement[.]" Notice of Final Hearing on Trustee's Motion for Final Approval of Additional Financing at 1. That notice was provided 15 days before the February 5 hearing. Read together, the two documents put the firm on notice that Comerica had agreed to provide the financing as described in the Supplement, including funding the expenses of the trustee and his professionals as set out in the itemization.

Thus, the firm was on notice beginning with the January 3 Supplement that the trustee proposed to borrow $888,469 that would be used to pay his expenses, including those of his professionals, related to completion of the construction project, and that the trustee did not propose to use any of those funds to pay any other administrative claims, including those of the firm. Therefore, the firm had sufficient notice and an opportunity to be heard with regard to its objections to that provision. The court did not violate the firm's due process rights.

4. *Approval of the fourth amendment to the financing order*

Section 364 governs the trustee's ability to obtain credit. If the trustee cannot obtain credit by offering the creditor a simple administrative priority, the trustee may seek court approval for obtaining credit that has "priority over any or all administrative expenses" or that is secured by a lien on otherwise unencumbered estate property or a junior lien on already encumbered estate property. § 364(c)(1) .

The firm makes four primary arguments: (1) the trustee's action in obtaining an agreement for payment of his and his professionals' fees and expenses resulted in a reordering of priorities set out in the Bankruptcy Code, because it preferred one group of administrative claimants over another group and was essentially an improper subordination of claims pursuant to § 510; (2) Comerica's agreement to pay the trustee's and his professionals' fees and expenses is essentially a § 506(c) surcharge, and surcharges under § 506(c) cannot be paid directly to the administrative claimant but must be paid to the trustee to be distributed according to

the distribution scheme set out in the Bankruptcy Code; (3) the trustee breached his fiduciary duty and misused his authority to obtain a surcharge under § 506(c) by entering into the agreement for a surcharge that pays only his and his professionals' fees and expenses; and (4) the trustee breached his duty to all creditors of the estate by providing services that benefit only a secured creditor.

The firm makes these specific arguments for the first time on appeal. The firm did not file a written objection to the motion to approve the additional financing. At the hearing, the firm focused primarily on its position that it had not gotten adequate notice of the provision for payment of the trustee and the trustee's professionals from the additional financing. We have already rejected the argument that the firm lacked adequate notice of the carve-out provision.

As to the substantive issues, the firm said that there were "a number of issues imbedded in this," Transcript of February 5, 2003 hearing at 9:13-14, and that it did not know "whether there's intended or will later be raised res judicata or collateral estoppel issues concerning whether there's a waiver of the Trustee's surcharge rights, whether there is some kind of resolution of the Trustee's fiduciary duty to handle — about how to handle the surcharge rights." *Id.* at 9:15-20. It argued that it was arbitrary to pay fees for services relating to completion of the construction project "from a selected date forward." *Id.* at 11:5-6.

Counsel also said that "[t]here are a number of legal issues here[,]" but did not specify what those legal issues were. *Id.* at 11:18-19. The firm referred to a waiver of § 506(c)

rights that had been contained in the original stipulation for postpetition financing, and said that the "506(c) waiver didn't have any specific lending front-end carve-out." *Id.* at 15:8-9. Counsel said that "the questions that will spring from [the modification of the § 506(c) waiver] are whether it's a legally sufficient — legally sufficient modification, whether it's an equitable modification. A lot of questions." *Id.* at 15:10-13.

Finally, counsel for the firm said:

> What I'm here to do is make sure that the record is clear that on both a procedural and a substantive basis, this provision which now appears to have had the cover lifted from it, to exclude us and pay for selected administrative expenses carries with it a lot of issues that I don't believe can be resolved finally here.

Id. at 15:19-24.

To preserve an issue for appeal, a party must raise it before the trial court:

> Citing cases that may contain a useful argument is simply inadequate to preserve that argument for appeal; "to be preserved, an argument must be pressed, and not merely intimated." In short, the argument must be raised to such a degree that the trial court may rule on it — a standard that clearly was not met in the instant case. The argument here was not even identified by name, much less advocated.

Appendix C

In re Babcock and Wilcox Co., 250 F.3d 955, 961 (5th Cir. 2001) (quoting *Matter of Fairchild Aircraft Corp.*, 6 F.3d 1119, 1128 (5th Cir. 1993); other citations omitted).

Nothing counsel said at the hearing before the bankruptcy court presented an issue on which the court could rule. Counsel merely stated generally that there were issues raised by this amendment to the stipulation, but did not specify what those issues were. To the extent counsel's comments cursorily raised substantive issues, they are not the issues that the firm now raises on appeal.

Issues not raised before the bankruptcy court will not be considered for the first time on appeal. *In re Ehrle*, 189 B.R. 771, 776 (9th Cir. BAP 1995). Because the firm had adequate notice of the provision about which it complains on appeal and did not make the substantive arguments it now urges at a time when the bankruptcy court could have considered and ruled on them, we decline to address them. Therefore, we will affirm the bankruptcy court's order.[12]

CONCLUSION

The appeal is not moot. The firm has standing to appeal the order approving the fourth amendment to the Third Stipulation. The firm had adequate notice that the trustee was seeking authorization to obtain funding that would pay

12. We do not intend by this disposition to foreclose the firm from raising in the bankruptcy court issues regarding the trustee's proper exercise of his duties at an appropriate time, such as on the trustee's final application for compensation.

his and his professionals' fees and not the fees of other administrative claimants, so that the firm was not denied due process. We will not address the substantive arguments that the firm makes on appeal, because it failed to make those arguments to the bankruptcy court. Therefore, we AFFIRM.

APPENDIX D — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION APPROVING THIRD AND FOURTH AMENDMENTS TO THIRD STIPULATION FOR FINANCING UNDER CONSTRUCTION LOAN AGREEMENT AND ADEQUATE PROTECTION ON FINAL BASIS WITH EXHIBITS DATED AND FILED FEBRUARY 5, 2003

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

Bk. No. LA 02-15392-BR
[Chapter 11]

In re

COOPER COMMONS, LLC,

Debtor and
Debtor-in-Possession.

ORDER APPROVING THIRD AND FOURTH AMENDMENTS TO THIRD STIPULATION FOR FINANCING UNDER CONSTRUCTION LOAN AGREEMENT AND ADEQUATE PROTECTION ON FINAL BASIS

Final Hearing:
DATE: February 5, 2003
TIME: 2:00 p.m.
PLACE: Courtroom 1668
255 E. Temple Street
Los Angeles, CA 90012

Appendix D

This order ("Order") is made at Los Angeles, California, in said district, on the 5th day of February, 2003.

On November 25, 2002, David A. Gill ("Trustee"), as Chapter 11 Trustee for Cooper Commons, LLC ("Debtor"), filed his Emergency Motion for Interim and Final Approval of Amendment to Third Stipulation for Additional Financing Under Construction Loan Agreement and Adequate Protection and For Final Approval of Possible Additional Financing (the "Motion") seeking, among other things, (1) this Court's authorization pursuant to 11 U.S.C. § 364 of the United States Code and Rule 4001 of the Federal Rules of Bankruptcy Procedure for the Trustee to enter into the Amendment to Third Stipulation for Financing Under Construction Loan Agreement and Adequate Protection ("Amendment") between the Trustee and Comerica Bank-California, successor-by-merger to Imperial Bank ("Comerica" or "Bank") and thereby to obtain secured post-petition financing from Comerica to fund, among other things, construction and completion of residential condominium units at the real property commonly described as 851-859 San Vicente Blvd., West Hollywood, California, and legally described as set forth in Exhibit "A" (the "Desmond Property"), pursuant to and subject to the terms and conditions contained in certain pre-petition Loan Documents (as defined in the "Stipulation" [as hereinafter defined]) and the *Third Stipulation for Financing under Construction Loan Agreement and Adequate Protection* (the "Stipulation") between the Debtor and Comerica, previously approved by this Court, as amended by the Amendment; (2) a preliminary hearing (the "Preliminary Hearing") on the Motion to consider entry of an interim order

approving the Amendment; and (3) requesting a final hearing be scheduled, and that notice procedures in respect to the Final Hearing be established by this Court, to consider entry of a final order (the "Final Order") approving, *inter alia*, the Amendment. Subsequently, Trustee and Comerica entered into (x) a Second Amendment to Third Stipulation for Financing under Construction Loan Agreement and Adequate Protection dated as of December 10, 2002 ("Second Amendment"), which was attached to the Supplemental Declaration of David A. Gill in Support of Additional Interim Financing filed herein on or about December 10, 2002, and (y) a Third Amendment to Third Stipulation for Financing under Construction Loan Agreement and Adequate Protection dated as of January 6, 2003 ("Third Amendment") attached as Exhibit "B" to this Court's order entered on January 8, 2003. The Second and Third Amendments supplement the financing of which approval is sought by the Motion, and further amends the Stipulation.

On or about January 3, 2003, the Trustee filed a Supplement of David A. Gill to Motion of Chapter 11 Trustee to Approve Second Amendment to Third Stipulation for Financing Under Construction Loan Agreement and Adequate Protection and Emergency Motion for Further Financing in which the Trustee sought, among other things, (x) approval of the Third Stipulation, (y) approval of additional financing (the "Additional Financing") in the amount of up to $5,148,610 (in excess of the amounts previously approved and provided for in the Amendment and the Second Amendment), and (z) approval of a construction contract with The Salter Group, Inc. ("Salter Contract").

Appendix D

On January 21, 2003, the Trustee served his Notice of Final hearing on Trustee's Motion for Final Approval of Additional Financing. In order to effectuate the Additional Financing, and subject to approval of the Additional Financing by Comerica, the Trustee proposes to enter into a Fourth Amendment to Third Stipulation for Financing under Construction Loan Agreement and Adequate Protection ("Fourth Amendment"), in substantially the form attached hereto as Exhibit "B", with the blank dates in paragraphs 2.5 and 3 being filled in as December 31, 2003. The form attached hereto as Exhibit "B" also was attached to the Notice of Filing of Fourth Amendment to Third Stipulation for Financing under Construction Loan Agreement and Adequate Protection served on January 31, 2003.

The pre-petition Loan Documents (as defined in the Stipulation), together with the Stipulation, as amended by the Amendment, the Second Amendment, the Third Amendment and the Fourth Amendment, and any orders approving the Stipulation, the Amendment, the Second Amendment, the Third Amendment or the Fourth Amendment, may hereinafter be referred to as the "DIP Financing Agreement". Any capitalized terms not defined herein shall have the meaning given in the Stipulation, as amended by the Amendment, the Second Amendment, the Third Amendment and the Fourth Amendment.

Preliminary Hearings on the Amendment, the Second Amendment and the Third Amendment were held on November 27, 2002, December 11, 2002, and January 7, 2003, respectively. A final hearing on the Amendment and

the Second Amendment was held on January 7, 2003, and the Amendment and the Second Amendment were approved on a final basis by this Court's order entered on January 8, 2003. A final hearing on the Third Amendment and the Fourth Amendment was held on February 5, 2003 ("Final Hearing").

The Court, having considered the pleadings and papers filed in support of the Motion, including the Third Amendment and the Fourth Amendment, any opposition thereto (if any), and the arguments of counsel, and having found that notice of the filing of the Motion, the Third Amendment and the Fourth Amendment, and of the Final Hearing, was given to all parties in interest required to receive notice under the circumstances; and it appearing to the Court that good and sufficient cause exists to grant the relief requested in the Motion, including the Third Amendment and the Fourth Amendment, under the circumstances present; makes the following FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDERS:

A. Cooper Commons, LLC (the "Debtor") filed with this Court a voluntary petition for relief pursuant to Title 11, United States Code (the "Bankruptcy Code") on February 22, 2002 (the "Petition Date"). Trustee was appointed as Chapter 11 Trustee for the Debtor's estate on November 20, 2002.

B. Preliminary Hearings in respect of the Amendment, the Second Amendment and the Third Amendment were held by this Court on November 27, 2002, December 11, 2002, and January 7, 2003, respectively. A final hearing in respect of the Amendment and the Second Amendment was held by

this Court on January 7, 2003, and this Court entered its order approving the same on a final basis on January 8, 2003. The Final Hearing on the Third Amendment and the Fourth Amendment was held by this Court on February 5, 2003. Proper, adequate and sufficient notice of (1) the Preliminary Hearings and the Final Hearing and (2) the relief requested in the Motion and approval of the DIP Financing Agreement, including the Third Amendment and the Fourth Amendment, has been given in accordance with all applicable law, including, without limitation, Section 364 of the Bankruptcy Code, Federal Rules of Bankruptcy Procedure 2002, 4001(c), 9006 and Local Bankruptcy Rules 2002-2 and 4001-1, to all parties in interest required to receive notice under the circumstances. Service of the moving papers and other papers related to the Motion and the DIP Financing Agreement, including the Third Amendment and the Fourth Amendment, also was timely and adequately given to all parties in interest required to receive them under the circumstances.

C. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

D. The Trustee does not have sufficient available sources of financing to carry on construction and pay for the work performed without the post-petition financing from Comerica. The Trustee's ability to preserve the estate's relationships with its contractors, subcontractors, and prospective purchasers, and to pay its employees and otherwise finance its operations, is essential to the estate's continued viability. In addition, the Trustee's need for financing is immediate. In the absence of post-petition

financing from Comerica, the continued construction of the project would not be possible, and serious and irreparable harm to the Debtor's estate would occur.

E. Given the estate's current financial condition, financing arrangements and capital structure, the Trustee cannot obtain unsecured credit allowable under Bankruptcy Code § 503(b)(l) as an administrative expense. Financing on a post-petition basis is not otherwise available without the Trustee (i) granting, pursuant to Bankruptcy Code § 364(c)(1), claims having priority over any and all administrative expenses of the kinds specified in Bankruptcy Code §§ 503(b) and 507(b), (ii) securing, pursuant to Bankruptcy Code § 364(c), such indebtedness and obligations with security interests in and liens upon the property of the Debtor's estate, and with the priority, described in the Stipulation, as amended by the Amendment, the Second Amendment, the Third Amendment and the Fourth Amendment, and (iii) providing for adequate protection of the pre-petition secured interests of Comerica, as described in the Stipulation, as amended by the Amendment, the Second Amendment, the Third Amendment and the Fourth Amendment.

F. Completion of the Desmond condominium project and payment for the work performed adequately protects the interests of holders of liens on the Desmond Property because this will substantially enhance the realizable value of such property.

G. Based on the record presented to the Court, the post-petition financing from Comerica has been negotiated in good

faith and at arms'-length between the Trustee and Comerica. Any credit extended and loans made to the Trustee pursuant to the DIP Financing Agreement shall be deemed to have been extended or made, as the case may be, in good faith as required by, and within the meaning of, Bankruptcy Code § 364(e).

H. Based on the record presented to the Court, the terms of the DIP Financing Agreement are fair and reasonable, reflect the Trustee's exercise of prudent business judgment consistent with his fiduciary duties, and are supported by reasonably equivalent value and fair consideration.

I. The Trustee has requested that this Order be effective immediately upon entry pursuant to Bankruptcy Rule 4001(a)(3) and (c)(2). The immediate effectiveness of this Order is necessary to avoid immediate and irreparable harm to the Debtor's estate and creditors. This Court concludes that entry of this Order is in the best interest of the Debtor's estate and creditors as its implementation will, among other things, provide financing necessary for the Trustee to continue construction of the Desmond condominium project.

Based upon the foregoing findings and conclusions, and upon the record made before this Court at the Preliminary Hearings and the Final Hearing, and good and sufficient cause appearing therefor;

Appendix D

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is granted.

2. The Third Amendment and the Fourth Amendment are hereby approved on a final basis. Subject to the terms and conditions of the DIP Financing Agreement, Comerica is authorized to advance and Trustee is authorized to borrow from Comerica the New Advances provided for in the Stipulation, as amended by the Amendment, the Second Amendment, the Third Amendment and the Fourth Amendment.

3. Trustee's execution of the Third Amendment and the Fourth Amendment is hereby ratified, authorized, and approved by this Court. Trustee is authorized, empowered, and directed to enter into the Third Amendment and the Fourth Amendment and to perform the Stipulation, as amended by the Amendment, the Second Amendment, the Third Amendment and the Fourth Amendment, and to enter into and execute any documents required thereby and any and all additional documents that may be reasonably necessary to carry out and consummate the Third Amendment, the Fourth Amendment or the Stipulation, as amended by the Amendment, the Second Amendment, the Third Amendment and the Fourth Amendment.

4. All of the terms and conditions of the Third Amendment and the Fourth Amendment are hereby incorporated herein by reference as though set forth in full herein *and are so ordered.*

5. Neither the Amendment, the Second Amendment, the Third Amendment or the Fourth Amendment, nor any New Advances made under the Stipulation as amended by the Amendment, the Second Amendment, the Third Amendment and the Fourth Amendment, nor this Order, shall cause any impairment or loss of priority of the lien of the Deed of Trust (as further modified by the modifications thereto provided for in the Amendment, Second Amendment, Third Amendment and Fourth Amendment) or any other of Comerica's security, all of which are, and shall be and remain, senior to all liens, claims and encumbrances on the Desmond Property and any other of Comerica's security.

6. None of the provisions of the DIP Financing Agreement, nor of the pre-petition Loan Document nor any post-petition financing previously approved by this Court, nor any of the rights and interests of Comerica under or as contemplated in any of the foregoing, may be modified, abrogated or otherwise impaired, whether by a plan of reorganization or otherwise, without the express written consent of Comerica, which it may give, withhold or condition in its sole and absolute discretion.

7. The Salter Contract is hereby approved on a final basis. Trustee's execution of the Salter Contract is hereby ratified, authorized, and approved by this Court. Trustee is authorized, empowered, and directed to enter into the Salter Contract and to enter into and execute any documents required thereby and any and all additional documents, that may be reasonably necessary to carry out and consummate the same.

8. This Order is effective immediately upon its entry and is not subject to the ten day stay imposed by Bankruptcy Rule 4001(a)(3) or any stay.

s/ [illegible]
UNITED STATES BANKRUPTCY JUDGE

Appendix D

EXHIBIT A

[Intentionally Omitted]

Appendix D

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

Bk. No. LA 02-15392-BR
[Chapter 11]

In re

COOPER COMMONS, LLC,

Debtor and
Debtor-in-Possession.

FOURTH AMENDMENT TO THIRD STIPULATION FOR FINANCING UNDER CONSTRUCTION LOAN AGREEMENT AND ADEQUATE PROTECTION

Date: February 5, 2003
Time: 2:00 p.m.
Place: 1668
255 E. Temple Street
Los Angeles, CA 90012

This Fourth Amendment to Third Stipulation for Financing Under Construction Loan Agreement and Adequate Protection ("Amendment") is entered into as of _____, 2003 by and among David A. Gill ("Trustee"), as Chapter 11 Trustee for the estate of Cooper Commons, LLC ("Debtor") and not in his individual capacity, and Comerica Bank-California, as successor-by-merger to Imperial Bank ("Bank"), with reference to the following facts:

Appendix D

A. Trustee is the duly appointed, qualified and acting Trustee for Debtor's estate. Debtor filed a voluntary Chapter 11 petition herein on February 22, 2002, and was a debtor-in-possession until Trustee was appointed as Chapter 11 Trustee herein effective on November 20, 2002.

B. Prior to the appointment of the Trustee, Debtor and Bank entered into a Third Stipulation for Financing Under Construction Loan Agreement and Adequate Protection dated as of October 11, 2002, and approved by a final order of this Court entered on October 21, 2002, which was amended by amendments thereto dated as of November 22, 2002, December 10, 2002, and January 6, 2003 (as so amended, the "Stipulation"). Capitalized terms used but not defined herein have the meanings ascribed thereto in the Stipulation.

C. Bank and Trustee desire further to amend the Stipulation to increase the amount of the New Advances and make other changes, in each case on the terms and conditions set forth herein.

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Trustee and Bank agree as follows:

1. Paragraphs A through C above are true and correct and are incorporated herein.

2. The Stipulation is hereby amended as follows:

2.1 Paragraph 4(a) is deleted and replaced with the following: "$5,741,220 to be funded and used

as follows: (x) $102,286.90 to be funded by Bank directly to itself to reimburse Bank for a protective advance to Debtor for utilities in the amount of $2,286.90 and for a protective advance to the Chapter 11 Trustee for Debtor's estate ('Trustee') in the amount of $100,000, and (y) the balance to be funded to Trustee upon request by the Trustee from time to time (or sooner, if Bank so elects in its sole and absolute discretion) after satisfaction of the Conditions Precedent. The amount funded to Trustee, as well as the protective advance previously made to the Trustee, are to be used by Trustee to the extent reasonably necessary, determined by the Trustee in his business judgment, to complete the Desmond Project and the Fountain Rehabilitation Project. Anything in this Stipulation to the contrary notwithstanding, the amount to be funded to the Trustee pursuant to this subparagraph shall not be subject to the disbursement procedures contained in the Construction Loan Agreement, and instead shall be disbursed directly to the Trustee as provided in this Stipulation. The amounts to be funded to the Trustee pursuant to this subparagraph shall include an amount of $888,469, which sum shall be placed by the Trustee in a separate account for the benefit of the Trustee and his professionals, and which shall be used only to pay the actual and necessary fees and costs of the Trustee and his professionals ("Trustee's Administrative Fund"). The professionals who

may look to this fund are the Trustee, all attorneys and accountants that may be employed by the Trustee at the expense of the estate, as well as the fees and costs of the Trustee's field representative, Kenneth B. Roelke, Inc. The Trustee's Administrative Fund shall be available for payment of such fees and costs approved by an order of the Court after notice and an opportunity for hearing, expended in connection with (a) completion of construction of the Fountain Rehabilitation Project and conveyance of the Fountain property, (b) completion of construction of and sale of units in the Desmond Project, and (c) matters necessary to administer the Debtor's estate during or as a consequence of the work described in clauses (b) and (c), including matters necessary in order to permit the Trustee to file his report pursuant to 11 U.S.C. § 1106(a)(4), but excluding any other work to investigate, prepare for, prosecute or defend avoidance or other litigation except to the extent covered by clauses (a) or (b). Until disbursed to make payments permitted hereby, the Trustee's Administration Fund shall be Collateral in which Bank shall have and is hereby granted a first priority security interest senior to all other present and future liens thereon or security interests or other interests therein, and any unused portion thereof shall be paid to Bank in reduction of any amounts owing by Debtor or Trustee to Bank."

Appendix D

2.2 Paragraph 4(c) is deleted and replaced with the following: "$380,635.68 to be withheld by Bank in response to bonded stop notices received by Bank; provided, however, that this clause does not affect the right of Bank to withhold funds from the New Advances and/or from sales proceeds or other Collateral in response to any other bonded stop notices. Any amounts withheld by Bank in response to bonded stop notices, including without limitation the $380,635.68 referenced in the preceding sentence, shall be Collateral in which Bank shall have and is hereby granted a first priority security interest senior to all other present and future liens thereon or security interests or other interests therein, and any unused portion thereof may be applied at any time and from time to time by Bank in reduction of any amounts owing by Debtor or Trustee to Bank."

2.3 Paragraph 12(a) is amended to change the dollar amount of "$2,960,635.68" to $7,221,855.68" in both places in which it appears, and to add the following sentence at the end of Paragraph 12(a): "The Loan Amount is reduced by any undrawn portion of the Loan Amount other than New Advances, and Bank shall not be obligated to advance any undrawn portion of the Loan Amount other than New Advances."

Appendix D

2.5 Paragraph F and 13(b) are amended to change the Maturity Date to _____, 2003.

3. Each of the Notes is amended to change the maturity date thereof to _____, 2003.

4. This Amendment shall be subject to the Conditions Precedent, as well as (x) execution by Trustee of a Third Amended and Restated Second Additional Advance Note and an additional Modification to Deed of Trust, (y) recordation of such additional Modification to Deed of Trust and issuance at Trustee's expense of such title indorsements as Bank requests, and (z) the entry by the Bankruptcy Court of any order approving this Amendment.

5. The Third Amended and Restated Second Additional Advance Note and the additional Modification to Deed of Trust to be executed as provided in this Amendment shall have the same priority and privileges as the Second Additional Advance Note and the Modification to Deed of Trust specified in the Stipulation.

6. Nothing herein contained is intended to nor shall impair the obligations of any guarantors, completion guarantors, or any other third parties.

7. Trustee and Bank agree that this Amendment is subject to Court approval. Trustee will undertake all steps necessary to seek Court approval of this Amendment and entry of appropriate orders of the bankruptcy court. This Amendment shall become effective upon final approval by the Bankruptcy Court. Such order shall constitute final

authority to obtain credit pursuant to Bankruptcy Rule 4001(c)(2). When such approval is obtained, this Amendment and the Stipulation (as amended by this Amendment) shall be binding upon and inure to the benefit of Bank and Trustee and their respective successors and assigns, including without limitation any successor or other Chapter 11 trustee or any Chapter 7 trustee appointed for Debtor's estate.

Supreme Court, U.S.
FILED
JAN 13 2006
OFFICE OF THE CLERK

No. 05-768

In The Supreme Court of the United States

WEINSTEIN, EISEN & WEISS LLP,

Petitioner,

v.

DAVID A. GILL, CHAPTER 11 TRUSTEE; COMERICA BANK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF IN OPPOSITION

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I.

RESPONSE TO QUESTIONS PRESENTED

In February 2003, the United States Bankruptcy Court for the Central District of California[1] authorized a Chapter 11 trustee to obtain additional financing pursuant to section 364 of the Bankruptcy Code.[2] The debtor's former bankruptcy counsel, Weinstein, Eisen & Weiss, LLP ("WEW"), did not oppose the financing agreement in general, but did oppose one particular term thereof. The Bankruptcy Court entered an order approving the proposed financing. The Bankruptcy Appellate Panel for the Ninth Circuit affirmed the Bankruptcy Court. On further appeal, the Ninth Circuit also affirmed. *Weinstein, Eisen & Weiss, LLP v. Gill* (*In re Cooper Commons, LLC*), 430 F.3d 1215 (9th Cir. 2005).

The grounds for the Ninth Circuit's decision were straightforward. First, the Court rejected WEW's argument that its due process rights had been violated. *Cooper Commons*, 430 F.3d at 1218. Second, the Court reaffirmed the Ninth Circuit's view that section 364(e) of the Bankruptcy Code applies to all terms in a financing agreement authorized under section 364, not just those specifically addressing the validity of a lender's claim or providing such lender a lien. *Cooper Commons*, 430 F.3d at 1219-1220. Last, the Court found that the Bankruptcy Court did not err when it found that the lender acted in good faith. *Cooper Commons*, 430 F.3d at 1220.

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[1] Hereinafter referred to as the "Bankruptcy Court."

[2] 11 U.S.C. §§ 101, et seq.

RESPONSE TO QUESTIONS PRESENTED – Continued

Noticeably absent from the Ninth Circuit's decision is any discussion as to whether the absence of a stay pending appeal "necessarily require[s] an outright dismissal for mootness" or a holding to that effect.[3] Moreover, this question was never raised by WEW in its briefs filed with the Ninth Circuit.[4] Respondents respectfully suggest that this question is not one properly presented for review by this Court. In any event, as discussed below, cases cited by WEW do not support its argument that there is a split in the circuits with respect to this question.[5]

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[3] The Ninth Circuit merely commented that "[s]ince [WEW] has failed to secure a stay, all that remains under § 364(e) is to review whether Comerica acted in good faith." *Cooper Commons*, 430 F.3d at 1220.

[4] In fact, WEW's briefs filed with the Ninth Circuit did not contain any citations to § 364(e). Further, in its reply brief, WEW did not respond at all to the Respondents' argument that WEW's appeal was moot.

[5] The only question properly presented in this appeal by WEW is: "Where mootness applies, does it extend to (and hence extinguish appeals about) any clause included in a bankruptcy financing order?" However, as discussed below, WEW fails to show that there is any disagreement between the circuits as to that question.

TABLE OF CONTENTS

		Page
I.	RESPONSE TO QUESTIONS PRESENTED...	i
II.	FACTS RELEVANT TO THIS APPEAL	1
III.	ARGUMENT.....	6
	A. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS THAT SECTION 364(E) APPLIES WHEN, AS HERE, FINANCING IS AUTHORIZED UNDER SECTION 364...	9
	B. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS THAT SECTION 364(E) APPLIES WHEN, AS HERE, THE LENDER ACTS IN GOOD FAITH	11
	C. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS THAT SECTION 364(E) MAY APPLY WHEN, AS HERE, THE AUTHORIZED FINANCING HAS BEEN FULLY DISBURSED BY THE LENDER.....	13
	D. THE TRUSTEE'S FINANCING ARRANGEMENT WITH COMERICA WAS PROPER...	16
IV.	CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES:

Boullioun Aircraft Holding Co., Inc. v. Smith Management (In re Western Pacific Airlines, Inc.), 181 F.3d 1191 (10th Cir. 1999) 15

Burchinal v. Central Washington Bank (In re Adam's Apple, Inc.), 829 F.2d 1484 (9th Cir. 1987) 10, 11, 16

Credit Alliance Corp. v. Dunning-Ray Ins. Agency, Inc. (In re Blumer), 66 B.R. 109 (9th Cir. BAP 1986) 16

Feder v. Lazar (In re Lazar), 83 F.3d 306 (9th Cir. 1996) 17

In re American Resources Management Corp., 51 B.R. 713 (Bankr. D. Utah 1985) 18

In re EDC Holding Co., 676 F.2d 945 (7th Cir. 1982) 11, 12, 13

In re Hotel Syracuse, Inc., 275 B.R. 679 (Bankr. N.D.N.Y. 2002) 18

In re Vanguard Diversified, Inc., 31 B.R. 364 (Bankr. E.D.N.Y. 1983) 9

New York Life Ins. Co. v. Revco D.S., Inc. (In re Revco D.S., Inc.), 901 F.2d 1359 (6th Cir. 1990) 8

Resolution Trust Corp. v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.), 16 F.3d 552 (3rd Cir. 1994) 13, 14, 15, 16, 17

Shapiro v. Saybrook Mfg. Co., Inc. (In re Saybrook Mfg. Co., Inc.), 963 F.2d 1490 (11th Cir. 1992) 10, 11

TABLE OF AUTHORITIES – Continued

Page

Unsecured Creditors' Committee v. First Nat'l Bank & Trust Co. of Escanaba (In re Ellingsen MacLean Oil Co., Inc.), 834 F.2d 599 (6th Cir. 1987)..... 7, 11, 16

Weinstein, Eisen & Weiss, LLP v. Gill (In re Cooper Commons, LLC), 430 F.3d 1215 (9th Cir. 2005)..... 7

STATUTES:

11 U.S.C.

§ 364(c)..... 6, 7, 9

§ 364(d)..... 8, 9, 15

§ 364(e)..... *passim*

OTHER AUTHORITIES:

H.R.Rep. No. 595, 95th Cong., 2nd Sess. 347..... 7

II.

FACTS RELEVANT TO THIS APPEAL

In February 2002, Cooper Commons, LLC (the "Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Prior to filing for bankruptcy, the Debtor was in the business of developing a 62-unit condominium complex, and associated property, in West Hollywood, California, known as "the Desmond." In order to avoid the need to include low-income housing units at the Desmond, the Debtor was also engaged in the process of rehabilitating an apartment complex known as "the Fountain," also in West Hollywood. As of the Petition Date, the Debtor's operations were funded by a construction loan from Comerica Bank ("Comerica").[6]

After it filed for bankruptcy, the Debtor continued to operate its business as a debtor-in-possession. The Debtor was represented in the bankruptcy case by the petitioner herein, Weinstein, Eisen & Weiss LLP ("WEW").

In June 2002, based upon allegations of fraud, dishonesty, misconduct, mismanagement and self-dealing, one of the Debtor's major creditors filed a motion for appointment of a Chapter 11 trustee. Subsequently, Comerica also sought the appointment of a Chapter 11 trustee. In November 2002, upon order of the Bankruptcy Court, David A. Gill (the "Trustee") was appointed as the Chapter 11 trustee for the Debtor's estate. The Trustee accepted such employment, qualified, and remains the acting Chapter 11 trustee.

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[6] Comerica is the successor by merger to Comerica Bank-California.

Ea n the case, on behalf of the Debtor, WEW had negotiated a postpetition financing agreement pursuant to which Comerica agreed to lend additional funds to the Debtor in order to complete construction of the Desmond. Under the agreement, Comerica was afforded a replacement lien on, among other things, all proceeds from the sale of condominium units at the Desmond. This agreement for postpetition financing was approved by the Bankruptcy Court through a series of stipulations, the last of which was the Third Stipulation for Financing Under Construction Loan Agreement and Adequate Protection (the "Stipulation"). However, it ultimately turned out that the amounts provided by Comerica to the Debtor under the financing stipulations were inadequate to complete construction of the Desmond.

When the Trustee was appointed in late November 2002, construction of the Desmond had not been completed. The Debtor had defaulted under its construction loan agreement and Comerica had terminated funding under the Stipulation. Comerica was owed in excess of $20 million, and there were no funds in the estate that were not subject to Comerica's liens. There was an impending deadline of December 31, 2002, imposed by the City of West Hollywood for transferring the renovated Fountain property to the West Hollywood Community Housing Corporation;[7] if that deadline was not met or extended, it would result in changes being made to the Desmond that would reduce its value substantially, to the detriment of

[7] The West Hollywood Community Housing Corporation is a nonprofit housing development organization that buys, builds, rehabilitates, and manages housing for lower-income people in the City of West Hollywood.

the estate. The Trustee determined that the general contractor, whose principal also owned and operated the Debtor, should be replaced. Subcontractors were owed hundreds of thousands of dollars for postpetition services and many had recorded mechanics' liens and/or stop notices. A number of subcontractors had walked off the job due to non-payment by the Debtor.

Within days, the Trustee negotiated an interim agreement with Comerica and obtained Bankruptcy Court approval of an amendment to the Stipulation which provided emergency funding to the Trustee for payment of immediate expenses. The Trustee worked quickly to employ a new general contractor, re-commence construction, and prepare a budget for completion of construction of the Desmond and associated property, in order to develop and present to Comerica a business plan for the completion of the Desmond. However, the Trustee was not prepared to undertake completion of the Desmond without some assurance of sufficient funding to do so, including for payment to himself and his professionals for their services relating thereto.[8]

In early January 2003, in connection with a continued hearing for approval of postpetition financing, the Trustee filed a declaration to which his budget was attached. The Trustee estimated that to complete the Desmond and some minor pickup work at the Fountain he needed additional financing of over $4.2 million for the "hard costs" of

[8] Unlike WEW, the Trustee and the Trustee's professionals did not have the benefit of seeking a prepetition retainer that could be used to pay for postpetition services. Prepetition, WEW had negotiated with the Debtor for a $70,000 retainer for its services in preparing for and in connection with the bankruptcy case.

construction. In addition, the Trustee estimated that the administrative expense to the estate for his required legal and administrative tasks directly related to completion of construction, marketing and sales of the Desmond and the Fountain, as well as a limited group of tasks not related to construction (most notably the preparation of the Trustee's mandatory report required to be given pursuant to section 1106 of the Bankruptcy Code), would total approximately $888,469. With the certain minor exceptions referred to above, the Trustee's budget did not include the estimated legal and administrative expenses to be incurred by the Trustee unrelated to the completion of the Desmond, such as the legal costs to be incurred in prosecuting the Debtor's principal, the general contractor, and affiliates thereof for misappropriation of millions of dollars.[9]

At a hearing on February 5, 2003, the Court approved, on a final basis, the Trustee's third and fourth amendments to the Stipulation. Such amendments provided for the establishment of a "Trustee's Administrative Fund," to be funded by Comerica in the amount of $888,469, from which fees and expenses of the Trustee and his professionals would be paid, subject to allowance of such fees and expenses by the Bankruptcy Court. No provision was made for payment of the fees and costs of the Debtor's professionals because the funding being provided by

[9] The provision at issue specifically provided that the Trustee's Administrative Fund was to be available for fees and costs expended in connection with "(a) completion of construction . . . and conveyance of the Fountain property, (b) completion and construction of and sale of units in the Desmond Project, and (c) matters necessary to administer the Debtor's estate during or as a consequence of the work described in clauses [(a)] and [(b)], including matters necessary in order to permit the Trustee to file his report pursuant to 11 U.S.C. § 1106(a)(4)."

Comerica was for the Trustee's completion of construction with which the Debtor and its professionals were not involved. WEW did not file a written opposition, but appeared, objected, and was heard. On February 6, 2003, the Court entered its order approving both amendments to the Stipulation (the "February 6 Order"). The order contained the following express finding of the Bankruptcy Court:

> Based on the record presented to the Court, the post-petition financing from Comerica has been negotiated in good faith and at arms'-length between the Trustee and Comerica. Any credit extended and loans made to the Trustee pursuant to the Debtor-in-Possession Financing Agreement shall be deemed to have been extended or made, as the case may be, in good faith as required by, and within the meaning of, Bankruptcy Code § 364(e).[10]

WEW appealed from the February 6 Order insofar that it related to the establishment of the Trustee's Administrative Fund. WEW did *not* challenge the Court's good faith finding relating to § 364(e) of the Code.

Construction of the Desmond was substantially completed in about December 2003, and all of the condominium units thereat were sold by the Trustee for full market value.[11] The proceeds of sales were paid over to

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[10] *See* WEW's Appendix D, pp. 52a-53a.

[11] This was accomplished only after the Trustee spent considerable time and effort in, among other things, seeking and obtaining relief from a Bankruptcy Court order obtained by the Debtor prior to the Trustee's appointment which authorized the assumption of certain "sweetheart" contracts (including a number of contracts with the Debtor's principal and the principal's son that did not actually exist) for

(Continued on following page)

Comerica from escrow. The Trustee paid and/or settled with all subcontractors who the Debtor had failed to pay, as well as all of the construction expenses incurred by the Trustee after his appointment. Pursuant to orders of the Bankruptcy Court, the entirety of the Trustee's Administrative Fund has been paid to the Trustee and his professionals on account of their court-approved fees and costs, and even after such payments, the Trustee and his professionals are owed substantial sums for their services in this case.[12] As of today, Comerica is still owed over $1.4 million.

III.

ARGUMENT

The issue arising from the Ninth Circuit's decision in this case is very narrow: When a lender extends credit to a trustee or debtor-in-possession in good faith on terms that are consistent with section 364(c) or (d) of the Bankruptcy Code, do the protections afforded by section 364(e) extend to all, or just some, of the terms of the financing approved by the bankruptcy court?

The Ninth Circuit properly determined that the protections in section 364(e) do, in fact, extend to all terms of the financing arrangement with Comerica, not just

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the sale of units to the Debtor's principal and the principal's friends and family members. Had the Trustee not done so, the estate would have received approximately $2.2 million less from the sale of condominium units at the Desmond.

[12] WEW inaccurately asserts that the Trustee "has since disbursed *most* of the Administrative Fund" (emphasis added). In fact, the entire Trustee's Administrative Fund has been disbursed pursuant to Bankruptcy Court orders authorizing such payments. WEW did not oppose such orders.

those that specifically granted Comerica claims against the estate or liens against estate property. *Weinstein, Eisen & Weiss, LLP v. Gill* (*In re Cooper Commons, LLC*), 430 F.3d 1215, 1219-1220 (9th Cir. 2005) ("it follows that any provisions of the financing agreement that Comerica might have bargained for or that helped to motivate its extension of credit are protected by § 364(e)"). The Court's determination is consistent with the legislative history for section 364(e), which section

> provides the same protection for credit extenders pending an appeal of an authorization to incur debt as is provided under section 363[m] for purchasers: the credit is not affected on appeal by reversal of the authorization unless the authorization and the incurring of the debt were stayed pending appeal. The protection runs to a good faith lender, whether or not he knew of the pendency of the appeal.

H.R.Rep. No. 595, 95th Cong., 2nd Sess. 347.

The question has been most directly addressed by the Sixth Circuit, beginning with *Unsecured Creditors' Committee v. First Nat'l Bank & Trust Co. of Escanaba* (*In re Ellingsen MacLean Oil Co., Inc.*), 834 F.2d 599 (6th Cir. 1987). In that case, the debtor borrowed funds from its existing lender and, as part of the financing agreement, agreed to settle all controversies regarding the validity of the lender's security interests by waiving any objections thereto. *Ellingsen*, 834 F.2d at 600-601. The Sixth Circuit noted that the challenged aspect of the financing was "part of the whole 'package' authorized under section 364(c)," *Id.* at 602, and concluded that it was entitled to section 364(e)'s protections. *Id.* at 604. "The proper recourse for the objecting creditor [was] to get the transaction stayed pending appeal." *Id.* at 604-605.

Similarly, in *New York Life Ins. Co. v. Revco D.S., Inc.* (*In re Revco D.S., Inc.*), 901 F.2d 1359 (6th Cir. 1990), the appellant generally supported the debtor obtaining a loan that was secured by a first-priority lien on assets on which other creditors held liens, but objected to the approval of the debtor paying the ..ow-junior secured lienholders periodic payments equal to the interest accruing on the debtor's prepetition obligations to such junior lienholders.[13] The appellant argued that the interim payments ordered by the bankruptcy court were severable from the rest of the financing order and were not protected from review under section 364(e). *Revco*, 901 F.2d at 1364. The Sixth Circuit rejected that argument.

The Sixth Circuit and Ninth Circuit are in agreement that when credit is extended in a manner that is consistent with section 364 of the Bankruptcy Code, *all* terms of the financing are entitled to protection under section 364(e). In an effort to persuade this Court to grant certiorari, WEW asserts that the Sixth and Ninth Circuit's holdings are contrary to those in the Eleventh, Seventh, and Third Circuits. In truth, none of the cases cited by WEW from those circuits address this issue.

Also in an effort to persuade this Court to grant certiorari, WEW argues that there is a split in the circuits as to whether the absence of a stay pending appeal necessarily requires dismissal of the appeal on mootness grounds. As noted above, WEW did not actually raise this

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[13] Section 364(d) provides that a priming lien may be given to a postpetition lender if there is "adequate protection" of the interest of the lienholder(s) whose secured interest(s) will become junior to the new lien. In *Revco*, such adequate protection took the form of periodic cash payments.

question before the Ninth Circuit. Further, although the Ninth Circuit mentioned that WEW failed to obtain a stay pending appeal, the Ninth Circuit did not actually make a ruling on the issue WEW seeks to litigate in this Court. In any event, the circuits are in agreement that when a lender extends credit authorized under section 364 in good faith, the proper recourse for the objecting creditor is to get the transaction stayed pending appeal.

A. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS THAT SECTION 364(E) APPLIES WHEN, AS HERE, FINANCING IS AUTHORIZED UNDER SECTION 364

The Eleventh Circuit case upon which WEW relies shows only that there is some disagreement on a completely different and specific question not at issue in this appeal – to wit, whether section 364(e) precludes an appellate court from examining whether cross-collateralization is authorized under section 364(c) or (d).[14] Section 364(c) provides that under certain circumstances the court may authorize a trustee or debtor-in-possession to obtain credit whereby the lender is given priority over administrative expenses, a security interest in property not otherwise subject to a lien, or a security interest in property where such security interest is junior to existing secured interests. Section 364(d) provides that under certain circumstances

[14] In the context of bankruptcy financing agreements, "cross-collateralization" occurs when a lender receives a security interest in postpetition assets to secure previously unsecured prepetition loans. Cross-collateralization is considered to be controversial and courts that do allow such provisions in financing agreements generally do so only in limited circumstances. *See In re Vanguard Diversified, Inc.*, 31 B.R. 364, 366 (Bankr. E.D.N.Y. 1983).

the court may authorize the trustee or debtor-in-possession to obtain credit whereby the lender is given a security interest in property where such security interest is senior to existing secured interests.

The disagreement as to that separate question is evidenced by the Ninth Circuit's decision in *Burchinal v. Central Washington Bank* (*In re Adam's Apple, Inc.*), 829 F.2d 1484 (9th Cir. 1987), and the Eleventh Circuit's decision in *Shapiro v. Saybrook Mfg. Co., Inc.* (*In re Saybrook Mfg. Co., Inc.*), 963 F.2d 1490 (11th Cir. 1992). In *Adam's Apple*, the bankruptcy court approved a financing arrangement which contained a cross-collateralization provision. The Ninth Circuit declined to address whether such a provision was authorized by section 364, but stated that to the extent such provisions exist in a debtor-in-possession financing agreement, "cross-collateralization clauses appear to be covered by section 364 and in turn subject to section 364(e)." *Adam's Apple*, 829 F.2d at 1488. On the other hand, in *Saybrook*, the Eleventh Circuit concluded that section 364, in authorizing the granting of postpetition liens to secure postpetition loans, does not authorize the granting of postpetition liens to secure prepetition loans and, as a result, cross-collateralization clauses are not covered by section 364 and, by extension, section 364(e) does not protect such liens. *Saybrook*, 963 F.2d at 1495. Accordingly, there may well be a split in the circuits as to whether cross-collateralization is authorized under section 364. Here, however, WEW's appeal does not involve a cross-collateralization challenge. WEW simply confuses the two circuits' different views on cross-collateralization as evidencing a disagreement as to the issue in this appeal.

In fact, the Eleventh Circuit acknowledges that section 364(e) applies "if the challenged lien or priority [in favor of the lender] was authorized under section 364." *Id.* at 1493. Here, WEW has not challenged any liens or priority granted to Comerica, the granting of which was authorized by the Bankruptcy Court under section 364.[15] WEW, like the appellant in *Ellingsen*, simply does not like one term of the overall package negotiated by the Trustee as an amendment to the Third Stipulation. As a result, since there is no dispute as to whether the financing from Comerica was provided under section 364, *Saybrook* supports the Ninth Circuit's determination that WEW's appeal is moot, and does not evidence any split in the circuits as to the narrow question actually at issue in this appeal.

B. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS THAT SECTION 364(E) APPLIES WHEN, AS HERE, THE LENDER ACTS IN GOOD FAITH

The second case relied upon by WEW, *In re EDC Holding Co.*, 676 F.2d 945 (7th Cir. 1982), also does not support WEW's claim that there is a split in the circuits. According to WEW, "Instead of limiting its analysis to the type of order at hand, the Seventh Circuit focused its attention first on whether the questioned provision in the loan was permissible." In fact, the opposite is true.

The Seventh Circuit stated that if the lender "was acting in good faith . . . the issue of validity [of the court's

[15] WEW itself negotiated the initial financing stipulations which gave Comerica a lien on all credit extended by Comerica postpetition, and then sought approval of such stipulations under section 364.

order] is therefore moot." *EDC*, 676 F.2d at 947. Thus, the Seventh Circuit actually first turned not to whether the questioned provision in the loan was permissible, but rather to the question of whether the lender in that case had acted in good faith. If the lender did act in good faith, then "[t]he proper recourse for the objecting creditor [was] to get the transaction stayed pending appeal." *Id.* at 947 (citing *In re Roberts Farms, Inc.*, 652 F.2d 793, 796-798 (9th Cir. 1981)). It was only *after* finding that the lender had not acted in good faith (in which case § 364(e) could not, by its terms, apply) that the Seventh Circuit turned to whether the provision at issue in that case was improper.

In the case at bench, the Bankruptcy Court made a specific factual finding of good faith for purposes of § 364(e). WEW did *not* challenge that finding on appeal, and the Ninth Circuit ruled that the Bankruptcy Court's finding was proper. As noted in *EDC*, the proper recourse for WEW was "to get the transaction stayed pending appeal." WEW having failed to do so, the Ninth Circuit's determination that WEW's appeal is moot was consistent with the Seventh Circuit's opinion in *EDC*. Moreover, the Seventh Circuit's opinion in *EDC* had nothing to do with whether section 364(e) protects some, instead of all, provisions of financing provided under section 364, and therefore cannot evidence any split in the circuits on that issue.

Further, WEW relies on *EDC* to support its argument that there is a split in the circuits as to whether "absence of a stay pending appeal of a bankruptcy financing order necessarily require[s] an outright dismissal for mootness."[16]

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[16] As noted above, Respondents submit that this issue was not raised by WEW before the Ninth Circuit, or addressed by the Ninth

(Continued on following page)

According to WEW, "even absent a stay, an offensive provision in a lending agreement was reversed." However, *EDC* actually contradicts WEW's argument in this appeal:

> The bankruptcy judge's order was never stayed. Therefore, if in lending [the debtor funds the lender] was acting in good faith, its priority could not be affected by the validity of the order and the issue of validity is therefore moot . . . . But if [the lender] was not acting in good faith, the [objecting party] was entitled to have the merits of its objection to the grant of priority adjudicated. . . . The proper recourse for the objecting creditor is to get the transaction stayed pending appeal.

EDC, 676 F.2d at 947. Therefore, under *EDC*, when credit is extended in good faith pursuant to section 364, an appeal is moot absent a stay pending appeal.

C. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS THAT SECTION 364(E) MAY APPLY WHEN, AS HERE, THE AUTHORIZED FINANCING HAS BEEN FULLY DISBURSED BY THE LENDER

The third and final case relied upon by WEW, *Resolution Trust Corp. v. Swedeland Dev. Group, Inc.* (*In re Swedeland Dev. Group, Inc.*), 16 F.3d 552 (3rd Cir. 1994), also supports the Ninth Circuit's decision in this case. WEW incorrectly claims that in *Swedeland*, the Third Circuit aligned itself with the Seventh Circuit and "expressly rejected the analysis of the Sixth and Ninth Circuits." According to WEW, "the Third Circuit allowed

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Circuit in its opinion, and therefore is not properly raised as a question presented in this appeal.

an appellate challenge to the questioned provision, even absent a stay, because the provision could not have had its roots in § 364."

The Third Circuit actually addressed two separate orders of the Bankruptcy Court – one entered in March 1992 (which WEW ignores) and another entered in April 1992. The lending authorized by the first order had been fully disbursed by the lender and the debtor had expended the funds; in contrast, the lending authorized by the second order had not been fully disbursed. *Swedeland*, 16 F.3d at 557. This distinction was key – the Court found that the appeal from the March 1992 order was moot, while the appeal from the April 1992 order was not moot because not all of the funds had been disbursed. As here, there was no challenge to the lenders' good faith. *Id.* at 559.

The Third Circuit first addressed the April 1992 order, and determined that the appeal therefrom was not moot. In doing so, the Third Circuit did, indeed, distinguish its approach from that of the Sixth and Ninth Circuits; however, the disagreement related to whether an appeal was moot when some, but not all, of the funds authorized to be lent were disbursed before the reversal. *Id.* at 561-562 ("[W]e acknowledge that there is some support in cases cited by Swedeland from the Courts of Appeals for the Sixth and Ninth Circuits for a contrary holding predicated on the ground that some of the funds authorized to be lent by that order were disbursed before the reversal.").

In contrast, there was no such disagreement in the case of the March 1992 order, where the loan had been fully disbursed. Therefore, the Third Circuit determined that the appeal of the March 1992 order *was* moot. *Id.* at 562. In fact, the Third Circuit stated that "[t]here is, of

course, *no doubt that under section 364(e) a stay is required*, except in cases in which the post-petition lender makes no disbursements before the district court decides the appeal on the merits, *if the party appealing from a section 364(d) order seeks to preserve its position completely.*" *Id.* at 562 n.10 (emphasis added).

In the case at bench, Comerica disbursed all of the funds that were subject to the financing arrangement with the Trustee. Further, the Trustee's Administrative Fund has been spent and the Trustee and his professionals are still owed hundreds of thousands of dollars for services provided and with respect to which the Court has entered orders awarding fees and costs therefor. Under such circumstances, the Third Circuit's opinion in *Swedeland* supports the Ninth Circuit's decision in this case that WEW's appeal is moot,[17] and does not evidence any disagreement among the circuits as to the questions presented in this appeal.

In fact, although the Third Circuit in *Swedeland* did not directly address the question of whether section 364(e) protects some, instead of all, provisions of financing provided under section 364, the decision actually appears to be consistent with the positions of the Sixth and Ninth Circuits. With respect to the March 1992 financing, the

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[17] Similarly, in *Boullioun Aircraft Holding Co., Inc. v. Smith Management (In re Western Pacific Airlines, Inc.)*, 181 F.3d 1191 (10th Cir. 1999), the lender's funds had been fully distributed in reliance upon the financing agreement. *Western Pacific*, 181 F.3d at 1196. Addressing one of the arguments raised by the appellant therein, the Tenth Circuit noted that the "*Swedeland* court found one of several financing orders . . . not moot on the grounds that funds under that order remained undistributed." *Id.* However, since all the funds in its case had been fully distributed, the Tenth Circuit determined that the lender was entitled to full protection under section 364(e). *Id.*

Third Circuit noted that the agreement provided for the establishment of an interest reserve for the benefit of the lender, and ruled that "voiding the reserve would impair the security for which [the lender] bargained and thus would be inconsistent with the protection afforded it by section 364(e)." Thus, after determining that the financing approved in the March 1992 order was protected by section 364(e), the Third Circuit determined that section 364(e) also protected those provisions of the agreement relating to the interest reserve.[18] Accordingly, *Swedeland* undercuts WEW's claim that there is a split in the circuits as to whether section 364(e) protects some, instead of all, provisions of financing provided under section 364.

D. THE TRUSTEE'S FINANCING ARRANGEMENT WITH COMERICA WAS PROPER

Notwithstanding that WEW did not appeal the Bankruptcy Court's finding of good faith, WEW disparages the Sixth and Ninth Circuits for, in WEW's view, allowing a debtor-in-possession or trustee to "team up" with a lender to include improper provisions in a financing order. However, the authorities are clear that if a party such as WEW wants to ensure that its challenge to all or part of a financing order is not moot under section 364(e), the proper recourse is for the party to seek a stay pending appeal. *Adam's Apple*, 829 F.2d at 1487-1488; *Ellingsen*, 834 F.2d at 604-605; *EDC*, 676 F.2d at 947; *Credit Alliance Corp. v. Dunning-Ray Ins. Agency, Inc.* (*In re Blumer*), 66 B.R. 109 (9th Cir. BAP 1986) ("Unless a stay has been

[18] The Third Circuit did so even though it believed that the appellant "would obtain effective relief by the voiding of the reserve." *Swedeland*, 16 F.3d at 563.

granted pending appeal, a reversal or modification of the court order on appeal does not affect the validity of a good faith creditor's loan or any liens or priorities securing the loan."); *Swedeland*, 16 F.3d at 562 n.10. Nevertheless, WEW never sought such a stay. Having failed to exercise all potential remedies available, WEW cannot now blame the courts for the fact that WEW's appeal is moot.

WEW's failure to even seek a stay is particularly remarkable given its claim that the Trustee's Administrative Fund is improper under the Ninth Circuit's own precedent in *Feder v. Lazar* (*In re Lazar*), 83 F.3d 306, 310 (9th Cir. 1996).[19] If the Trustee's Administrative Fund is clearly improper, it should have been easy for WEW to obtain a stay. In truth, the facts in *Lazar* are distinguishable from the facts in this case since *Lazar* involved the rights of competing administrative claimants to *unencumbered* assets of the estate. In contrast, cases involving facts such as those found here – where the funds are fully encumbered by liens in favor of Comerica and junior lienholders and WEW has no right to recover any such funds – support the Trustee and Comerica's position. *See*

[19] WEW asserts that "disparate treatment of equally ranked administrative claimants . . . is plainly improper under the Bankruptcy Code." In this case, the body of administrative claimants include subcontractors and similar persons who participated in the construction of the Desmond and rehabilitation of the fountain, and who have all received payment for their services. Notably, WEW does *not* assert that it is entitled to share in the distributions to all of those equally ranked creditors (who would, then, be required to return compensation paid to them). Moreover, given that a remedy sought by WEW in this case is to share pro rata in the Trustee's Administrative Fund, WEW has no problem with the establishment of such a fund so long as WEW itself benefits therefrom. Thus, despite its indignation, WEW appears to be willing to allow some of the "mischief" it alleges that the Ninth Circuit is choosing to ignore.

In re Hotel Syracuse, Inc., 275 B.R. 679 (Bankr. N.D.N.Y. 2002) (secured creditor consented to the payment of the debtor's counsel's fees from its collateral, but not to payment of the committee counsel's fees); *In re American Resources Management Corp.*, 51 B.R. 713 (Bankr. D. Utah 1985) (secured creditor permitted a portion of its cash collateral to be used to pay fees and expenses of the trustee and his counsel, while allowing a smaller portion to be used to pay the fees for the attorneys and accountants of the creditors' committee).

In this case, Comerica loaned additional funds to the Trustee to complete construction of the Desmond and the Fountain. Comerica retained a lien on such funds until spent by the Trustee, and Comerica was afforded a first-priority lien on proceeds from the sale of units at the Desmond. It is undisputed that Comerica was (and remains) undersecured; further, even if the Trustee had been able to receive sufficient sale proceeds to pay Comerica in full, there were and are a number of creditors holding junior liens against the sale proceeds. As a result, but for the existence of the Trustee's Administrative Fund, none of the funds loaned to the Trustee by Comerica or the sale proceeds would be available to pay the Trustee and his professionals. Under such circumstances, Courts recognize the ability of a secured creditor to control the use of its own funds.

IV.

CONCLUSION

There is no split in the circuits on the question at issue in this appeal; the only courts to address this narrow issue are in agreement. Further, the cases relied upon by

WEW actually support the Ninth Circuit's determination that WEW's appeal is moot pursuant to section 364(e) of the Code. Accordingly, the Trustee and Comerica request that WEW's petition for certiorari be denied.

Respectfully submitted,

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No. 05-768

In The Supreme Court of the United States

WEINSTEIN, EISEN & WEISS LLP,

Petitioner,

v.

DAVID A. GILL, CHAPTER 11 TRUSTEE; COMERICA BANK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO JOINT BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
REPLY TO JOINT BRIEF IN OPPOSITION	3
A. The Issue of How to Apply the Mootness Provision Is Ripe for Review	3
B. The Eleventh Circuit Is in Direct Conflict with the Ninth Circuit with Regards to Requiring Scrutiny of the Financing Provision Prior to a Determination on the Mootness Issue	4
C. The Seventh Circuit Is in Direct Conflict with the Ninth Circuit with Regards to the Issue of How the Lender's Good Faith Is Examined in Applying the Mootness Statute	7
D. Respondents' Reference to the Availability of Funds Is a Red Herring	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Burchinal v. Central Washington Bank (In re Adams Apple, Inc.), 829 F.2d 1484 (9th Cir. 1987) 4, 5, 6

In re EDC Holding Co., 676 F.2d 945 (7th Cir. 1982) 2, 7

Shapiro v. Saybrook Manufacturing Co., Inc. (In re Saybrook Manufacturing Co., Inc.), 963 F.2d 1490 (11th Cir. 1992) 2, 4, 5, 6

The Resolution Trust Corporation v. Swedeland Development Group, Inc. (In re Swedeland Development Group, Inc.), 16 F.3d 552 (3rd Cir. 1994) 3, 8, 9

Weinstein, Eisen & Weiss, LLP v. Gill, et al. (In re Cooper Commons LLC), 424 F.3d 963 (9th Cir. 2005) 1, 3, 4, 5, 9

FEDERAL STATUTES

11 U.S.C.

§ 364 ..... 1, 2, 3, 4

§ 364(c) 4

§ 364(d) 4, 9, 10

§ 364(e) ..... *passim*

SUMMARY OF ARGUMENT

The Petition seeks a review of the Ninth Circuit's interpretation of the statutory mootness provision in 11 U.S.C. § 364(e), about which the circuits are sharply split. The question is whether a challenge to a questionable provision concerning the usage of bankruptcy funds escapes judicial scrutiny merely because it is included in an unstayed financing order. In the case at bench, the Ninth Circuit in *Cooper Commons* dismissed the appeal as moot, holding that section 364(e) automatically mooted any challenge to a provision for special treatment of selected administrative expenses because it was included in a financing order. However, several other circuits have applied § 364(e) exactly the opposite way, specifically requiring scrutiny of the challenged provision before determining if a challenge to it is moot.

The Respondents contend that the court in *Cooper Commons* did not require an outright dismissal for mootness in the absence of a stay, and hence, according to Respondents, the mootness issue is not ripe for review. In fact, the Ninth Circuit actually dismissed Petitioner's appeal as moot without reviewing its substantive objections solely because Petitioner had failed to obtain a stay. Therefore, this issue is not only "ripe for review", it is, in fact, the precise focus of the circuit split.

In addition, although the Respondents contend that the Eleventh, Seventh and the Third Circuits are not in conflict with the Ninth Circuit (or the Sixth), plainly they are. Petitioner's reply highlights language taken directly from those circuits' decisions which reveals that there is indeed a sharp split among them on this very issue. First, the conclusions reached by the Eleventh and Ninth Circuits

are in direct conflict with regards to whether or not the court should scrutinize the financing provision(s) in issue *before* making a determination on the mootness issue. Specifically, the Eleventh Circuit in *Saybrook* first analyzed the provision in question to see if it was something "within section 364" (*i.e.*, truly a financing feature, as compared to something foreign that is put there solely to escape review by invocation of mootness). Something not based in section 364 is not subject to mootness. The Ninth Circuit handled the same issue exactly the opposite way: having been presented a document entitled "financing order", it concluded that *any* dispute, about *anything* in it, was moot, regardless of what it purported to be and whether it actually had anything to do with financing or section 364. Thus, there is a sharp split on this very important issue that dictates the outer boundaries of what can be forced through the bankruptcy system without judicial scrutiny.

Similarly, the Respondents argue that the Seventh Circuit's decision in *EDC Holding* does not support Petitioner's claim that there is a split among the circuits. Specifically, Respondents assert that the Seventh Circuit did not first scrutinize the loan transaction itself, but rather analyzed first whether the lender had acted in "good faith". However, direct language from the case reveals that the Seventh Circuit first scrutinized the challenged provision to determine if the loan was permissible. The Seventh Circuit reasoned that if the loan was improper under the Bankruptcy Code, the lender could not have been acting in "good faith". Therefore, the Seventh Circuit's initial attention was on the finance provision, which shows that its interpretation of how to apply the

mootness clause is also in direct conflict with the Ninth Circuit's.

Finally, Respondents argue that there is no disagreement between the Third and Ninth Circuits because both jurisdictions refer to the availability (or unavailability) of funds in making the determination as to whether an appeal should be held moot. However, the Ninth Circuit never referred to, much less relied upon, the availability of funds and this issue was never raised in *Cooper Commons*. Furthermore, the Third Circuit's view, reflected in *Swedeland*, is aligned with both the Seventh and Eleventh Circuits' views, since the Third Circuit distinctly held that section 364 did not automatically moot an appeal merely because no stay was in place, notwithstanding that it was a financing order that was under scrutiny.

For the foregoing reasons and as described below in greater detail, this Court is urged to grant certiorari so it can resolve the sharp split among the circuits on a very important public issue that affects billions of dollars of financing transactions in the business bankruptcy environment every year.

REPLY TO JOINT BRIEF IN OPPOSITION

A. The Issue of How to Apply the Mootness Provision Is Ripe for Review.

Respondents contend that the issue of "mootness" is not ripe for review because the Ninth Circuit's decision did not discuss whether the absence of a stay pending appeal necessarily required an outright dismissal for mootness. The Respondents argue that "the Ninth Circuit merely commented that since WEW has failed to secure a stay, all

that remains under section 364(e) is to review whether Coamerica acted in good faith". *Respondents' Joint Brief in Opposition* ("Opposition"), at p. ii n. 3.

Whether the Ninth Circuit in *Cooper Commons* "actually discussed" an automatic dismissal is irrelevant because the Ninth Circuit indisputably precluded substantive review and dismissed Petitioner's appeal due to the absence of a stay. *Weinstein, Eisen & Weiss, LLP v. Gill, et al. (In re Cooper Commons LLC)*, 424 F.3d 963, 970 (9th Cir. 2005) ("[t]he Weinstein firm['s] . . . substantive objections to the agreement are moot"). The issue of how the mootness statute is to be applied presents a sharp split that is extremely important and entirely ripe for review in the circumstances presented here.

B. The Eleventh Circuit Is in Direct Conflict with the Ninth Circuit with Regards to Requiring Scrutiny of the Financing Provision Prior to a Determination on the Mootness Issue.

The Respondents contend that WEW relies on cases which only show "some disagreement", and even then, only as to a question not at issue in this appeal, namely whether section 364(e) precludes an appellate court from examining whether cross-collaterization is authorized under section 364(c) or (d). Opposition at 9-10.

The Respondents further contend that both the Ninth and Eleventh Circuits in *Burchinal v. Central Washington Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484 (9th Cir. 1987) and *Shapiro v. Saybrook Manufacturing Co., Inc. (In re Saybrook Manufacturing Co., Inc.)*, 963 F.2d 1490 (11th Cir. 1992), respectively, only considered whether cross-collateralization was authorized under section 364. They

argue that WEW's appeal did not involve a cross-collateralization challenge and, therefore, those two cases are inapplicable and that *Adams Apple* simply supports the holding in *Saybrook*. Opposition at 11.

The Respondents' reading of *Adam's Apple* and *Saybrook* is artificially narrow and fails to give recognition to the precedential value of opinions by the circuit courts of appeal. Neither of these cases is merely about "cross-collateralization" and both are about the reach, meaning and effect of the mootness provision in section 364(e). In fact, even though *Cooper Commons* did not have anything to do with the issue of cross-collateralization, the Ninth Circuit specifically referred to *Adam's Apple* as the basis for its discussion of section 364(e). *Cooper Commons*, 424 F.3d at 968. Obviously, if *Adams Apple* was only a cross-collateralization case, the Ninth Circuit would not have relied on it in *Cooper Commons*.

As set forth in the certiorari petition, the Eleventh Circuit in *Saybrook* refused to read section 364(e) to automatically moot anything and everything labeled or included in a "financing order". Specifically, the Eleventh Circuit declined to determine if the appeal was moot under 364(e) until it first addressed the substantive issue asserted to be moot – which happened to be whether cross-collateralization was authorized under section 364.[1] On

[1] Furthermore, by this correct analysis, it is seen that the fact that the dispute in *Saybrook* was over cross-collateralization is almost secondary. It could have been *any* disputed point that was not central to financing – like ours; or those related to fees of the debtor's attorney, that they squeezed into the financing order. This shows that the case *was not* about cross-collateralization only. The case was about mootness and whether a court can look at the substantive question at all. Which,

(Continued on following page)

the other hand, the Ninth Circuit in *Adams Apple* (and again in *Cooper Commons*) reviewed the "mootness" issue first, before deciding on the validity of the financing provision – and thereby precluded a review of the "financing provision" altogether. This reading of section 364(e) allowed the mootness question to prevent any examination of the substantive issue at all, no matter how offensive or irregular it might be. *See Adams Apple*, 829 F.2d at 1489.

In *Saybrook*, certain creditors objected to the debtor's intent to "cross-collaterize" the lender's pre-petition debt with unencumbered property. After the district court dismissed the appeal as moot because the objecting creditors failed to obtain a stay, the Eleventh Circuit reversed and held that the appeal was *not* moot because cross-collateralization was not authorized under the Bankruptcy Code and could not escape scrutiny merely because it was grafted into a financing order. 963 F.2d at 1496. It is thus clear that the *Saybrook* court used an approach exactly opposite to the one that the Ninth Circuit used in *Adam's Apple* and here, since the Ninth Circuit dismissed the appeals in the absence of a stay and expressly declined to decide whether cross-collateralization or self-interested categorization of administrative expenses were wrongful provisions. *See Adam's Apple*, 829 F.2d at 1489 n. 6, 1491 ("[w]e dismiss the appeal as moot because our consideration of the merits is barred by 11 U.S.C. § 364(e)); *see also*, *Saybrook*, 963 F.2d at 1493-94 ("[l]ike in Adams Apple, the issue in *In re Elingsen* was whether section 364(e) rendered an appeal moot because the appellants failed to obtain a stay"). Therefore, the *Saybrook* decision simply

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of several possible substantive questions happens to be in play, is secondary.

does not "support the Ninth Circuit's determination that WEW's appeal is moot . . . " Opposition at 11. The Ninth and Eleventh Circuits are directly in conflict on the operation of this federal statute.

C. The Seventh Circuit Is in Direct Conflict with the Ninth Circuit with Regards to the Issue of How the Lender's Good Faith Is Examined in Applying the Mootness Statute.

Respondents assert that the Seventh Circuit is aligned with the Ninth Circuit, and that the Seventh Circuit did not first turn to the issue as to whether the questioned provision in the loan was permissible, but rather, to the issue of whether the lender had acted in good faith. Opposition at 11-12. This is simply a misreading of the case.

In *In re EDC Holding Co.*, 676 F.2d 945, 949 (7th Cir. 1982), even though the objecting creditor failed to obtain a stay, the Seventh Circuit reversed the order of the bankruptcy judge approving the provision in the lending agreement. The court did not simply first determine whether or not the lender had acted in "good faith", but rather, the court scrutinized the transaction itself to determine if the loan was permissible. This is perfectly analogous to the Eleventh Circuit's initial assessment of the propriety of the cross-collateralization provision. The relevant language in *EDC* is as follows:

> Where it is evident from the loan agreement itself that the transaction has an intended effect that is improper under the Bankruptcy Code, the lender is not in good faith, and it is irrelevant what the improper purpose is.

Id. at 948.

It is certainly clear from the court's language that the Seventh Circuit did not first turn to the issue of "good faith". Rather, the court turned first to the loan provisions being attacked to ascertain if they were improper under the Bankruptcy Code. From that, it concluded that the lender could be found not to have entered into the transaction in "good faith".[2] Again, Respondents have simply misconstrued this case and the two circuits are sharply conflicted.

D. Respondents' Reference to the Availability of Funds Is a Red Herring.

The availability of funds in the subject loan has no significance in the circumstances of our case. The Respondents rely on the Third Circuit's decision in *The Resolution Trust Corporation v. Swedeland Development Group, Inc. (In re Swedeland Development Group, Inc.)*, 16 F.3d 552, 562-63 (3rd Cir. 1994), which held that an appeal over the subject March 1992 financing order was moot because the court could not fashion appropriate relief where all funds had been disbursed. That the Third Circuit so held is irrelevant here and certainly does not prove there is no circuit split on the issue(s) actually raised in this case. Respondents argue that Petitioner's appeal is moot because "[i]n the case at bench, Comerica disbursed all of the funds that were subject to the financing arrangement with

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[2] Regardless of whether or not the Seventh Circuit first scrutinized the issue of "good faith" or required scrutiny of the challenged loan provision, the end result is the same in that the court was required to examine the integrity of the lending provision. Unlike the Ninth Circuit, the Seventh Circuit did not, under any circumstances, require an automatic mootness with regard to the substantive issues in the case for an unstayed appeal.

the Trustee". Opposition at 15. However, that was never the basis for the conclusion reached by the Ninth Circuit, and the court never relied upon the availability (or unavailability) of funds to determine whether or not this appeal was moot. Moreover, Respondents never made this argument below and the record does not support their contention here.[3]

The Third Circuit did, however, make rulings that are in direct conflict with the Ninth Circuit's holding. For instance, it is clear that the Ninth Circuit in *Cooper Commons* held that section 364(e) automatically mooted any appeal of a financing order where a stay had not been obtained, thereby precluding any review of the provisions creating the Administrative Fund and the Fee Disbursement provision even if they were improper or even illegal. 424 F.3d at 969-70. On the other hand, the Third Circuit distinctly held that section 364 did not automatically moot such appeals in circumstances where no stay had been obtained.

> Thus, we start our discussion by referring to section 364(e), the source of [debtor's] mootness argument. That section does not, in itself, suggest that an appeal from an order authorizing the creation of a . . . lien under 364(d) should be dismissed by reason of mootness when an appellant fails to obtain a stay pending an appeal. Indeed, section 364(e) never mentions that an appeal may be dismissed if a stay is not obtained.

Swedeland, 16 F.3d at 559.

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[3] There is no evidence or any record in the Ninth Circuit that 100% of the funds were disbursed. Obviously, the Ninth Circuit could not have used that "fact".

> Thus, it seems to us that there is no escape from the logic that inasmuch as section 364(e) provides for the consequences of the reversal or modification of an order under section 364(d) when an order has not been stayed pending appeal, it is impossible to conclude that section 364(e) in itself requires that an appeal be dismissed if a stay is not obtained. After all, neither [debtor] or anyone else can explain how there can be a 'reversal or modification' of an order, if the appeal from the order has been dismissed.

Id. at 559.

For these reasons, the Third and Ninth Circuits are also in conflict, emphasizing the need for certiorari in this case.

CONCLUSION

The circuit decisions are rather clearly split on the important issues discussed herein. Accordingly, the Petitioner respectfully requests that the petition for certiorari be granted.

DATED: February 9, 2006

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